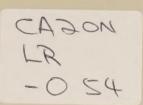
B 2 STORAGE Digitized by the Internet Archive in 2022 with funding from University of Toronto









ONTARIO LABOUR RELATIONS BOARD REPORTS

January 1996



ONTARIO LABOUR RELATIONS BOARD

Chair

Alternate Chair Vice-Chair R.O. MacDOWELL

R.J. HERMAN

C.J. ALBERTYN

M. BENDEL

J.B. BLOCH

P. CHAPMAN

L. DAVIE

N.V. DISSANAYAKE

D. GEE

R.G. GOODFELLOW

B. HERLICH

D.L. HEWAT

R.D. HOWE

M.K. JOACHIM

J. JOHNSTON

B. KELLER

P. KNOPF

J. KOVACS

S. LIANG

G. MISRA

M.A. NAIRN

K. O'NEIL

K. PETRYSHEN

N.B. SATTERFIELD

L. SHOULDICE

I.M. STAMP

R. STOYKEWYCH

G. SURDYKOWSKI

L. TRACHUK

K. WHITAKER

Members

B.L. ARMSTRONG
K.S. BRENNAN
A.R. FOUCAULT
W.N. FRASER
P.V. GRASSO
V. HARRIS
J. IRVINE
J. KENNEDY
S. LAING
C. McDONALD

O.R. McGUIRE G. McMENEMY R.R. MONTAGUE

D.A. PATTERSON

H. PEACOCK

Registrar Board Solicitors R.W. PIRRIE F.B. REAUME

J. REDSHAW

J.A. RONSON J.A. RUNDLE

D. RYAN

P. SEVILLE

R.M. SLOAN M. SULLIVAN

J. TRIM

M. VUKOBRAT

R. WEISS

W.H. WIGHTMAN D.G. WOZNIAK

T.A. INNISS K. HESHKA R. LEBI

K.A. MacDONALD

ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the Ontario Labour Relations Board

Cited [1996] OLRB REP. JANUARY



EDITOR: RON LEBI

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

CASES REPORTED

1.	Dryden District Roman Catholic Separate School Board; Re Office and Professional Employees International Union	1
2.	Elirpa Construction and Materials Limited; Re Kevin Smith and Clifford Wilkinson; Re IUOE, Local 793	4
3.	Law Development Group; Carpenters and Allied Workers Local 27, CJA	13
4.	Manac, a Division of the Canam Manac Group Inc.; Re National Automobile, Aerospace, Transportation and General workers union of Canada (CAW-Canada)	16
5.	Maverick Mechanical Contractors Limited; Re Local Union 47 Sheet Metal Workers' International Association	17
6.	Ontario Public Service Employees Union; Re Tracy Mclellan, Jennifer Faulkiner, Sharon Haviland, Mary-Lou Reeves, Maxine Rapai, Donna Dempsey	20
7.	Ontario Public Service Employees Union; Re Tracy Mclellan, Jennifer Faulkiner, Sharon Haviland, Mary-Lou Reeves, Maxine Rapai, Donna Dempsey	21
8.	Ontario Public Service Employees Union; Re Tracy Mclellan, Jennifer Faulkiner, Sharon Haviland, Mary-Lou Reeves, Maxine Rapai, Donna Dempsey	23
9.	Ontario Truss and Wall, 520601 Ontario Ltd., o/a; Re Ian Crockford et al; Re CJA and its Local 1030	24
10.	Rapid Forming Inc., Carpenters and Allied Workers Local 27, CJA and; Re LIUNA, Local 506	26
11.	Sudbury & District Health Unit, ONA and; Re Association of Allied Health Professionals: Ontario	28
12.	Tisdelle Enterprises Limited c.o.b. as Tim Horton's; Re USWA and John Henson	40
13.	Traugott Construction (Kitchener) Limited; LIUNA, Local 1081	45
	COURT PROCEEDINGS	
1.	Domtar Inc. Communications, Energy and Paperworkers Union of Canada, C.L.C. Local 212 and 338 and The OLRB; Re Independent Paperworkers of Canada	53
2.	J.P. Murphy Inc.; Re Ontario (Ontario Labour Relations Board) and USWA	54
3.	Robertson-Yates Corporation Limited and The OLRB; Re IBEW, Local 105, PAT, Locals 205 and 1824, UA, Local 67	55

SUBJECT INDEX

Bargaining Unit - Certification - Judicial Review - IPC seeking to displace CEP Local 338 as bargaining agent for certain maintenance employees of paper mill - CEP Locals 212 and 338 asserting that established bargaining structure involving single bargaining unit including all maintenance and production employees, and that IPC should not be allowed to carve out bargaining unit from existing structure - Board finding that established bargaining structure was one bargaining unit and dismissing IPC's application - IPC's application for judicial review dismissed by Divisional Court	
DOMTAR INC. COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, C.L.C. LOCAL 212 AND 338 AND THE OLRB; RE INDEPENDENT PAPERWORKERS OF CANADA	53
Bargaining Unit - Certification - Subsequent to taking of representation vote (in which more than 50 percent of ballots cast were cast in favour of union), certain employees writing to Board expressing concern that maintenance employees ought not to be included in bargaining unit with production employees as agreed to by employer and union - Board satisfied that employees' representations raising no allegations which would change result of application - Board issuing final decision without a hearing - Certificate issuing	
MANAC, A DIVISION OF THE CANAM MANAC GROUP INC.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)	16
Certification - Bargaining Unit - Judicial Review - IPC seeking to displace CEP Local 338 as bargaining agent for certain maintenance employees of paper mill - CEP Locals 212 and 338 asserting that established bargaining structure involving single bargaining unit including all maintenance and production employees, and that IPC should not be allowed to carve out bargaining unit from existing structure - Board finding that established bargaining structure was one bargaining unit and dismissing IPC's application - IPC's application for judicial review dismissed by Divisional Court	
DOMTAR INC. COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, C.L.C. LOCAL 212 AND 338 AND THE OLRB; RE INDEPENDENT PAPERWORKERS OF CANADA	53
Certification - Bargaining Unit - Subsequent to taking of representation vote (in which more than 50 percent of ballots cast were cast in favour of union), certain employees writing to Board expressing concern that maintenance employees ought not to be included in bargaining unit with production employees as agreed to by employer and union - Board satisfied that employees' representations raising no allegations which would change result of application - Board issuing final decision without a hearing - Certificate issuing	
MANAC, A DIVISION OF THE CANAM MANAC GROUP INC.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)	16
Certification - Board granting "interim" certification to union on November 6, 1995 in connection with certification application made on October 11, 1995 - Bill 7 providing that amended provisions of Labour Relations Act applying retroactively to certification applications filed after October 4, 1995 in which no "final decision" had yet issued - Board determining that certification decision made on November 6, 1995 a "final decision" for purposes of transitional provisions under Bill 7	
DRYDEN DISTRICT ROMAN CATHOLIC SEPARATE SCHOOL BOARD; RE OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION	1

Certification - Construction Industry - Reconsideration - Representation Vote - Board rejecting union's request to schedule second representation vote where vote was held five days after filing of application, but on day that employees not scheduled to work and in circumstances where only one of five eligible voters cast ballot - Board not prepared to draw inference that vote not a true reflection of desires of the employees - Reconsideration application dismissed	
MAVERICK MECHANICAL CONTRACTORS LIMITED; RE LOCAL UNION 47 SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION	17
Certification - Employer Support - Evidence - Intimidation and Coercion - Judicial Review - Natural Justice - Practice and Procedure - Employer's allegations of unlawful employer support for certification application and unlawful intimidation of employees dismissed by Board for disclosing no <i>prima facie</i> case - Employer applying for judicial review on several grounds including alleged denial of natural justice - Application for judicial review dismissed by Divisional Court	
J.P. MURPHY INC.; RE ONTARIO (ONTARIO LABOUR RELATIONS BOARD) AND USWA	54
Charges - Construction Industry - Employee - Employer Initiation - Intimidation and Coercion - Termination - Board rejecting union's argument that newly enacted subsection 63(16) of the Act confirming Board's historical practice of requiring applicant in termination proceedings to establish voluntariness of petition - Board expressing view that hearing under subsection 63(16) should be convened only where allegations of misconduct have been pleaded in such a manner as to establish <i>prima facie</i> case of employer initiation or employer threats and coercion - Board considering relevance of rule in <i>April Waterproofing</i> case after Bill 7 and concluding that union may still allege in termination application that one or more employees on the application date had been hired contrary to the collective agreement and therefore unable to properly cast a ballot in a representation vote	
ELIRPA CONSTRUCTION AND MATERIALS LIMITED; RE KEVIN SMITH AND CLIFFORD WILKINSON; RE IUOE, LOCAL 793	4
Charges - Employer Initiation - Intimidation and Coercion - Construction Industry - Representation Vote - Termination - In response to termination application, union seeking dismissal under subsection 63(16) of the Act and pleading material facts sufficient to establish <i>prima facie</i> case of employer initiation or employer threats and intimidation in connection with application - Board directing that representation vote be deferred until determination of allegations raised by union and listing matter for hearing	
ONTARIO TRUSS AND WALL, 520601 ONTARIO LTD., O/A; RE IAN CROCK-FORD ET AL; RE CJA AND ITS LOCAL 1030	24
Collective Agreement - Construction Industry - Judicial Review - Voluntary Recognition - Related Employer - Sale of a Business - Board finding that 1966 sale transaction between "old RYCO" and "new RYCO" not giving rise to "successor rights" obligations because 1957 Working Agreement entered into by "old RYCO" was "recognition agreement" and not "collective agreement" - Board declining to declare "old RYCO" and "new RYCO" related employers in circumstances where the companies ceased carrying on related or associated activities or businesses several years prior to enactment of subsection 1(4) of the Act - Sale of business and related employer applications dismissed - Unions' application for judicial review dismissed by Divisional Court	
ROBERTSON-YATES CORPORATION LIMITED AND THE OLRB; RE IBEW, LOCAL 105, PAT, LOCALS 205 AND 1824, UA, LOCAL 67	55
Construction Industry - Certification - Reconsideration - Representation Vote - Board rejecting union's request to schedule second representation vote where vote was held five days after	

where only one of five eligible voters cast ballot - Board not prepared to draw inference that vote not a true reflection of desires of the employees - Reconsideration application dismissed	
MAVERICK MECHANICAL CONTRACTORS LIMITED; RE LOCAL UNION 47 SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION	17
Construction Industry - Charges - Employee - Employer Initiation - Intimidation and Coercion - Termination - Board rejecting union's argument that newly enacted subsection 63(16) of the Act confirming Board's historical practice of requiring applicant in termination proceedings to establish voluntariness of petition - Board expressing view that hearing under subsection 63(16) should be convened only where allegations of misconduct have been pleaded in such a manner as to establish <i>prima facie</i> case of employer initiation or employer threats and coercion - Board considering relevance of rule in <i>April Waterproofing</i> case after Bill 7 and concluding that union may still allege in termination application that one or more employees on the application date had been hired contrary to the collective agreement and therefore unable to properly cast a ballot in a representation vote	
ELIRPA CONSTRUCTION AND MATERIALS LIMITED; RE KEVIN SMITH AND CLIFFORD WILKINSON; RE IUOE, LOCAL 793	4
Construction Industry - Charges - Employer Initiation - Intimidation and Coercion - Representation Vote - Termination - In response to termination application, union seeking dismissal under subsection 63(16) of the Act and pleading material facts sufficient to establish <i>prima facie</i> case of employer initiation or employer threats and intimidation in connection with application - Board directing that representation vote be deferred until determination of allegations raised by union and listing matter for hearing	
ONTARIO TRUSS AND WALL, 520601 ONTARIO LTD., O/A; RE IAN CROCK-FORD ET AL; RE CJA AND ITS LOCAL 1030	24
Construction Industry - Collective Agreement - Judicial Review - Voluntary Recognition - Related Employer - Sale of a Business - Board finding that 1966 sale transaction between "old RYCO" and "new RYCO" not giving rise to "successor rights" obligations because 1957 Working Agreement entered into by "old RYCO" was "recognition agreement" and not "collective agreement" - Board declining to declare "old RYCO" and "new RYCO" related employers in circumstances where the companies ceased carrying on related or associated activities or businesses several years prior to enactment of subsection 1(4) of the Act - Sale of business and related employer applications dismissed - Unions' application for judicial review dismissed by Divisional Court	
ROBERTSON-YATES CORPORATION LIMITED AND THE OLRB; RE IBEW, LOCAL 105, PAT, LOCALS 205 AND 1824, UA, LOCAL 67	55
Construction Industry - Construction Industry Grievance - Sector Determination - Employer disputing jurisdiction of Board to determine union's grievance on basis that work in question falling within sewer and watermain sector and road sector, and not I.C.I. sector of construction industry - Employer asking Board to make sector determination under section 166 of the Act - Board applying London Sandblasting case and ruling that employer bargaining agency having authority to negotiate clause in Provincial Agreement providing that that agreement applying in all other sectors where certain conditions met - Board concluding that it has jurisdiction to arbitrate issues raised by grievance - Board also concluding that terms of Provincial Agreement precluding need for sector determination	
TRAUGOTT CONSTRUCTION (KITCHENER) LIMITED; LIUNA, LOCAL 1081	45
Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Carpenters' union and Labourers' union disputing assignment of certain work in connection with place-	

ment and rough assembly of column forms on parking garage construction project - declining to hear oral evidence on issue of employer practice desired to be called b penters' union - Board confirming employer's composite crew assignment	Board y Car-
RAPID FORMING INC., CARPENTERS AND ALLIED WORKERS LOCAL 27 AND; RE LIUNA, LOCAL 506	7, CJA 26
Construction Industry - Fraud - Termination - Union certified following failure of employer subsequently seeking to terminate bargaining rig alleged fraud - Employer alleging that union filed membership evidence on bel employees who were not its employees - Employer's application dismissed for fail make out <i>prima facie</i> case	thts for half of
LAW DEVELOPMENT GROUP; CARPENTERS AND ALLIED WORKERS LO	OCAL 13
27, CJA	
Construction Industry Grievance - Construction Industry - Sector Determination - Employ puting jurisdiction of Board to determine union's grievance on basis that work in que falling within sewer and watermain sector and road sector, and not I.C.I. sector of struction industry - Employer asking Board to make sector determination under section of the Act - Board applying London Sandblasting case and ruling that employer barg agency having authority to negotiate clause in Provincial Agreement providing the agreement applying in all other sectors where certain conditions met - Board conditions that it has jurisdiction to arbitrate issues raised by grievance - Board also concluding terms of Provincial Agreement precluding need for sector determination	uestion of con- ion 166 gaining that cluding ng that
TRAUGOTT CONSTRUCTION (KITCHENER) LIMITED; LIUNA, LOCAL 10	81 45
Employee - Charges - Construction Industry - Employer Initiation - Intimidation and Coe Termination - Board rejecting union's argument that newly enacted subsection 63 the Act confirming Board's historical practice of requiring applicant in termination ceedings to establish voluntariness of petition - Board expressing view that hearing subsection 63(16) should be convened only where allegations of misconduct have pleaded in such a manner as to establish <i>prima facie</i> case of employer initiation or employees and coercion - Board considering relevance of rule in <i>April Waterproofing</i> case Bill 7 and concluding that union may still allege in termination application that one of employees on the application date had been hired contrary to the collective agreement therefore unable to properly cast a ballot in a representation vote	of (16) of on programmer property of the prope
ELIRPA CONSTRUCTION AND MATERIALS LIMITED; RE KEVIN SMITH CLIFFORD WILKINSON; RE IUOE, LOCAL 793	H AND 4
Employer Initiation - Charges - Construction Industry - Employee - Intimidation and Coe Termination - Board rejecting union's argument that newly enacted subsection 63 the Act confirming Board's historical practice of requiring applicant in termination ceedings to establish voluntariness of petition - Board expressing view that hearing subsection 63(16) should be convened only where allegations of misconduct have pleaded in such a manner as to establish <i>prima facie</i> case of employer initiation or enthreats and coercion - Board considering relevance of rule in <i>April Waterproofing</i> can Bill 7 and concluding that union may still allege in termination application that one comployees on the application date had been hired contrary to the collective agreement therefore unable to properly cast a ballot in a representation vote	8(16) of on programmer of prog
ELIRPA CONSTRUCTION AND MATERIALS LIMITED; RE KEVIN SMITH CLIFFORD WILKINSON; RE IUOE, LOCAL 793	
Employer Initiation - Charges - Intimidation and Coercion - Construction Industry - Reprition Vote - Termination - In response to termination application, union seeking distunder subsection 63(16) of the Act and pleading material facts sufficient to establish	ismissal

facie case of employer initiation or employer threats and intimidation in connection with application - Board directing that representation vote be deferred until determination of allegations raised by union and listing matter for hearing	
ONTARIO TRUSS AND WALL, 520601 ONTARIO LTD., O/A; RE IAN CROCK-FORD ET AL; RE CJA AND ITS LOCAL 1030	24
Employer Support - Certification - Evidence - Intimidation and Coercion - Judicial Review - Natural Justice - Practice and Procedure - Employer's allegations of unlawful employer support for certification application and unlawful intimidation of employees dismissed by Board for disclosing no <i>prima facie</i> case - Employer applying for judicial review on several grounds including alleged denial of natural justice - Application for judicial review dismissed by Divisional Court	
J.P. MURPHY INC.; RE ONTARIO (ONTARIO LABOUR RELATIONS BOARD) AND USWA	54
Evidence - Certification - Employer Support - Intimidation and Coercion - Judicial Review - Natural Justice - Practice and Procedure - Employer's allegations of unlawful employer support for certification application and unlawful intimidation of employees dismissed by Board for disclosing no <i>prima facie</i> case - Employer applying for judicial review on several grounds including alleged denial of natural justice - Application for judicial review dismissed by Divisional Court	
J.P. MURPHY INC.; RE ONTARIO (ONTARIO LABOUR RELATIONS BOARD) AND USWA	54
Evidence - Construction Industry - Jurisdictional Dispute - Practice and Procedure - Carpenters' union and Labourers' union disputing assignment of certain work in connection with placement and rough assembly of column forms on parking garage construction project - Board declining to hear oral evidence on issue of employer practice desired to be called by Carpenters' union - Board confirming employer's composite crew assignment	
RAPID FORMING INC., CARPENTERS AND ALLIED WORKERS LOCAL 27, CJA AND; RE LIUNA, LOCAL 506	26
Fraud - Construction Industry - Termination - Union certified following failure of employer to respond to application - Employer subsequently seeking to terminate bargaining rights for alleged fraud - Employer alleging that union filed membership evidence on behalf of employees who were not its employees - Employer's application dismissed for failure to make out <i>prima facie</i> case	
LAW DEVELOPMENT GROUP; CARPENTERS AND ALLIED WORKERS LOCAL 27, CJA	13
Intimidation and Coercion - Certification - Employer Support - Evidence - Judicial Review - Natural Justice - Practice and Procedure - Employer's allegations of unlawful employer support for certification application and unlawful intimidation of employees dismissed by Board for disclosing no <i>prima facie</i> case - Employer applying for judicial review on several grounds including alleged denial of natural justice - Application for judicial review dismissed by Divisional Court	
J.P. MURPHY INC.; RE ONTARIO (ONTARIO LABOUR RELATIONS BOARD) AND USWA	54
Intimidation and Coercion - Charges - Construction Industry - Employee - Employer Initiation - Termination - Board rejecting union's argument that newly enacted subsection 63(16) of the Act confirming Board's historical practice of requiring applicant in termination proceedings to establish voluntariness of petition - Board expressing view that hearing under subsection 63(16) should be convened only where allegations of misconduct have been	

pleaded in such a manner as to establish <i>prima facie</i> case of employer initiation or employer threats and coercion - Board considering relevance of rule in <i>April Waterproofing</i> case after Bill 7 and concluding that union may still allege in termination application that one or more employees on the application date had been hired contrary to the collective agreement and therefore unable to properly cast a ballot in a representation vote	
ELIRPA CONSTRUCTION AND MATERIALS LIMITED; RE KEVIN SMITH AND CLIFFORD WILKINSON; RE IUOE, LOCAL 793	4
Intimidation and Coercion - Charges - Employer Initiation - Construction Industry - Representation Vote - Termination - In response to termination application, union seeking dismissal under subsection 63(16) of the Act and pleading material facts sufficient to establish <i>prima facie</i> case of employer initiation or employer threats and intimidation in connection with application - Board directing that representation vote be deferred until determination of allegations raised by union and listing matter for hearing	
ONTARIO TRUSS AND WALL, 520601 ONTARIO LTD., O/A; RE IAN CROCK-FORD ET AL; RE CJA AND ITS LOCAL 1030	24
Judicial Review - Bargaining Unit - Certification - IPC seeking to displace CEP Local 338 as bargaining agent for certain maintenance employees of paper mill - CEP Locals 212 and 338 asserting that established bargaining structure involving single bargaining unit including all maintenance and production employees, and that IPC should not be allowed to carve out bargaining unit from existing structure - Board finding that established bargaining structure was one bargaining unit and dismissing IPC's application - IPC's application for judicial review dismissed by Divisional Court	
DOMTAR INC. COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, C.L.C. LOCAL 212 AND 338 AND THE OLRB; RE INDEPENDENT PAPERWORKERS OF CANADA	53
Judicial Review - Certification - Employer Support - Evidence - Intimidation and Coercion - Natural Justice - Practice and Procedure - Employer's allegations of unlawful employer support for certification application and unlawful intimidation of employees dismissed by Board for disclosing no prima facie case - Employer applying for judicial review on several grounds including alleged denial of natural justice - Application for judicial review dismissed by Divisional Court	
J.P. MURPHY INC.; RE ONTARIO (ONTARIO LABOUR RELATIONS BOARD) AND USWA	54
Judicial Review - Collective Agreement - Construction Industry - Voluntary Recognition - Related Employer - Sale of a Business - Board finding that 1966 sale transaction between "old RYCO" and "new RYCO" not giving rise to "successor rights" obligations because 1957 Working Agreement entered into by "old RYCO" was "recognition agreement" and not "collective agreement" - Board declining to declare "old RYCO" and "new RYCO" related employers in circumstances where the companies ceased carrying on related or associated activities or businesses several years prior to enactment of subsection 1(4) of the Act - Sale of business and related employer applications dismissed - Unions' application for judicial review dismissed by Divisional Court	
ROBERTSON-YATES CORPORATION LIMITED AND THE OLRB; RE IBEW, LOCAL 105, PAT, LOCALS 205 AND 1824, UA, LOCAL 67	55
Jurisdictional Dispute - AAHP:O and ONA disputing assignment of work performed in "Genetic Counselor" classification at district health unit - Provisions of relevant collective agreements and past practice of exclusive assignment of work to nurses combining to outweigh other factors - Board accordingly ordering that employer cease assigning disputed work to	

	persons covered by AAHP:O collective agreement, and that it restore assignment to persons covered by ONA collective agreement	
	SUDBURY & DISTRICT HEALTH UNIT, ONA AND; RE ASSOCIATION OF ALLIED HEALTH PROFESSIONALS: ONTARIO	28
l 1	ictional Dispute - Construction Industry - Evidence - Practice and Procedure - Carpenters' union and Labourers' union disputing assignment of certain work in connection with placement and rough assembly of column forms on parking garage construction project - Board declining to hear oral evidence on issue of employer practice desired to be called by Carpenters' union - Board confirming employer's composite crew assignment	
	RAPID FORMING INC., CARPENTERS AND ALLIED WORKERS LOCAL 27, CJA AND; RE LIUNA, LOCAL 506	26
í	al Justice - Certification - Employer Support - Evidence - Intimidation and Coercion - Judicial Review - Practice and Procedure - Employer's allegations of unlawful employer support for certification application and unlawful intimidation of employees dismissed by Board for disclosing no <i>prima facie</i> case - Employer applying for judicial review on several grounds including alleged denial of natural justice - Application for judicial review dismissed by Divisional Court	
	J.P. MURPHY INC.; RE ONTARIO (ONTARIO LABOUR RELATIONS BOARD) AND USWA	54
[]	ce and Procedure - Certification - Employer Support - Evidence - Intimidation and Coercion - Judicial Review - Natural Justice - Employer's allegations of unlawful employer support for certification application and unlawful intimidation of employees dismissed by Board for disclosing no <i>prima facie</i> case - Employer applying for judicial review on several grounds including alleged denial of natural justice - Application for judicial review dismissed by Divisional Court	
	J.P. MURPHY INC.; RE ONTARIO (ONTARIO LABOUR RELATIONS BOARD) AND USWA	54
1 1	ce and Procedure - Construction Industry - Evidence - Jurisdictional Dispute - Carpenters' union and Labourers' union disputing assignment of certain work in connection with placement and rough assembly of column forms on parking garage construction project - Board declining to hear oral evidence on issue of employer practice desired to be called by Carpenters' union - Board confirming employer's composite crew assignment	
	RAPID FORMING INC., CARPENTERS AND ALLIED WORKERS LOCAL 27, CJA AND; RE LIUNA, LOCAL 506	26
]	ce and Procedure - Termination - Timeliness - Board declining to "waive" rules of procedure providing that termination application considered filed on date that it is received by Board - Board finding termination application untimely in view of appointment of conciliation officer - Application dismissed	
	ONTARIO PUBLIC SERVICE EMPLOYEES UNION; RE TRACY MCLELLAN, JENNIFER FAULKINER, SHARON HAVILAND, MARY-LOU REEVES, MAXINE RAPAI, DONNA DEMPSEY	23
1	sideration - Certification - Construction Industry - Representation Vote - Board rejecting union's request to schedule second representation vote where vote was held five days after filing of application, but on day that employees not scheduled to work and in circumstances where only one of five eligible voters cast ballot - Board not prepared to draw inference	

	that vote not a true reflection of desires of the employees - Reconsideration application dismissed	
	MAVERICK MECHANICAL CONTRACTORS LIMITED; RE LOCAL UNION 47 SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION	17
Re	lated Employer - Collective Agreement - Construction Industry - Judicial Review - Voluntary Recognition - Sale of a Business - Board finding that 1966 sale transaction between "old RYCO" and "new RYCO" not giving rise to "successor rights" obligations because 1957 Working Agreement entered into by "old RYCO" was "recognition agreement" and not "collective agreement" - Board declining to declare "old RYCO" and "new RYCO" related employers in circumstances where the companies ceased carrying on related or associated activities or businesses several years prior to enactment of subsection 1(4) of the Act - Sale of business and related employer applications dismissed - Unions' application for judicial review dismissed by Divisional Court	
	ROBERTSON-YATES CORPORATION LIMITED AND THE OLRB; RE IBEW, LOCAL 105, PAT, LOCALS 205 AND 1824, UA, LOCAL 67	55
Re	presentation Vote - Certification - Construction Industry - Reconsideration - Board rejecting union's request to schedule second representation vote where vote was held five days after filing of application, but on day that employees not scheduled to work and in circumstances where only one of five eligible voters cast ballot - Board not prepared to draw inference that vote not a true reflection of desires of the employees - Reconsideration application dismissed	
	MAVERICK MECHANICAL CONTRACTORS LIMITED; RE LOCAL UNION 47 SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION	17
Re	presentation Vote - Charges - Employer Initiation - Intimidation and Coercion - Construction Industry - Termination - In response to termination application, union seeking dismissal under subsection 63(16) of the Act and pleading material facts sufficient to establish <i>prima facie</i> case of employer initiation or employer threats and intimidation in connection with application - Board directing that representation vote be deferred until determination of allegations raised by union and listing matter for hearing	
	ONTARIO TRUSS AND WALL, 520601 ONTARIO LTD., O/A; RE IAN CROCK-FORD ET AL; RE CJA AND ITS LOCAL 1030	24
Sal	le of a Business - Collective Agreement - Construction Industry - Judicial Review - Voluntary Recognition - Related Employer - Board finding that 1966 sale transaction between "old RYCO" and "new RYCO" not giving rise to "successor rights" obligations because 1957 Working Agreement entered into by "old RYCO" was "recognition agreement" and not "collective agreement" - Board declining to declare "old RYCO" and "new RYCO" related employers in circumstances where the companies ceased carrying on related or associated activities or businesses several years prior to enactment of subsection 1(4) of the Act - Sale of business and related employer applications dismissed - Unions' application for judicial review dismissed by Divisional Court	
	ROBERTSON-YATES CORPORATION LIMITED AND THE OLRB; RE IBEW, LOCAL 105, PAT, LOCALS 205 AND 1824, UA, LOCAL 67	55
Sec	ctor Determination - Construction Industry - Construction Industry Grievance - Employer disputing jurisdiction of Board to determine union's grievance on basis that work in question falling within sewer and watermain sector and road sector, and not I.C.I. sector of construction industry - Employer asking Board to make sector determination under section 166 of the Act - Board applying London Sandblasting case and ruling that employer bargaining agency having authority to negotiate clause in Provincial Agreement providing that that agreement applying in all other sectors where certain conditions met - Board concluding	

	IX
that it has jurisdiction to arbitrate issues raised by grievance - Board also concluding that terms of Provincial Agreement precluding need for sector determination	
TRAUGOTT CONSTRUCTION (KITCHENER) LIMITED; LIUNA, LOCAL 1081	45
Settlement - Unfair Labour Practice - Union moving to have employer's application under subsection 96(7) of the Act dismissed for failure to make out <i>prima facie</i> case - Employer seeking to enforce representations under subsection 96(7) not reflected in minutes of settlement - Subsection 96(7) not designed to enforce oral representations - Application dismissed	
TISDELLE ENTERPRISES LIMITED C.O.B. AS TIM HORTON'S; RE USWA AND JOHN HENSON	40
Termination - Charges - Construction Industry - Employee - Employer Initiation - Intimidation and Coercion - Board rejecting union's argument that newly enacted subsection 63(16) of the Act confirming Board's historical practice of requiring applicant in termination proceedings to establish voluntariness of petition - Board expressing view that hearing under subsection 63(16) should be convened only where allegations of misconduct have been pleaded in such a manner as to establish <i>prima facie</i> case of employer initiation or employer threats and coercion - Board considering relevance of rule in <i>April Waterproofing</i> case after Bill 7 and concluding that union may still allege in termination application that one or more employees on the application date had been hired contrary to the collective agreement and therefore unable to properly cast a ballot in a representation vote	
ELIRPA CONSTRUCTION AND MATERIALS LIMITED; RE KEVIN SMITH AND CLIFFORD WILKINSON; RE IUOE, LOCAL 793	4
Termination - Charges - Employer Initiation - Intimidation and Coercion - Construction Industry - Representation Vote - In response to termination application, union seeking dismissal under subsection 63(16) of the Act and pleading material facts sufficient to establish <i>prima facie</i> case of employer initiation or employer threats and intimidation in connection with application - Board directing that representation vote be deferred until determination of allegations raised by union and listing matter for hearing	
ONTARIO TRUSS AND WALL, 520601 ONTARIO LTD., O/A; RE IAN CROCK-FORD ET AL; RE CJA AND ITS LOCAL 1030	24
Fermination - Construction Industry - Fraud - Union certified following failure of employer to respond to application - Employer subsequently seeking to terminate bargaining rights for alleged fraud - Employer alleging that union filed membership evidence on behalf of employees who were not its employees - Employer's application dismissed for failure to make out <i>prima facie</i> case	
LAW DEVELOPMENT GROUP; CARPENTERS AND ALLIED WORKERS LOCAL 27, CJA	13
Termination - Pleadings demonstrating apparent disagreement between applicant, employer and union concerning number of employees in bargaining unit - Board inviting submissions in view of potential effect on outcome of application	
ONTARIO PUBLIC SERVICE EMPLOYEES UNION; RE TRACY MCLELLAN, JENNIFER FAULKINER, SHARON HAVILAND, MARY-LOU REEVES, MAXINE	

RAPAI, DONNA DEMPSEY

Termination - Practice and Procedure - Timeliness - Board declining to "waive" rules of procedure providing that termination application considered filed on date that it is received by

20

Board - Board finding termination application untimely in view of appointment of conciliation officer - Application dismissed	
ONTARIO PUBLIC SERVICE EMPLOYEES UNION; RE TRACY MCLELLAN, JENNIFER FAULKINER, SHARON HAVILAND, MARY-LOU REEVES, MAXINE RAPAI, DONNA DEMPSEY	23
Termination - Timeliness - Union writing to Board subsequent to filing response to termination application and asserting that application untimely in view of appointment of conciliation officer - Board inviting other parties' submissions in view of appearance that application untimely	
ONTARIO PUBLIC SERVICE EMPLOYEES UNION; RE TRACY MCLELLAN, JENNIFER FAULKINER, SHARON HAVILAND, MARY-LOU REEVES, MAXINE RAPAI, DONNA DEMPSEY	21
Timeliness - Practice and Procedure - Termination - Board declining to "waive" rules of procedure providing that termination application considered filed on date that it is received by Board - Board finding termination application untimely in view of appointment of conciliation officer - Application dismissed	
ONTARIO PUBLIC SERVICE EMPLOYEES UNION; RE TRACY MCLELLAN, JENNIFER FAULKINER, SHARON HAVILAND, MARY-LOU REEVES, MAXINE RAPAI, DONNA DEMPSEY	23
Timeliness - Termination - Union writing to Board subsequent to filing response to termination application and asserting that application untimely in view of appointment of conciliation officer - Board inviting other parties' submissions in view of appearance that application untimely	
ONTARIO PUBLIC SERVICE EMPLOYEES UNION; RE TRACY MCLELLAN, JENNIFER FAULKINER, SHARON HAVILAND, MARY-LOU REEVES, MAXINE RAPAI, DONNA DEMPSEY	21
Unfair Labour Practice - Settlement - Union moving to have employer's application under subsection 96(7) of the Act dismissed for failure to make out <i>prima facie</i> case - Employer seeking to enforce representations under subsection 96(7) not reflected in minutes of settlement - Subsection 96(7) not designed to enforce oral representations - Application dismissed	
TISDELLE ENTERPRISES LIMITED C.O.B. AS TIM HORTON'S; RE USWA AND JOHN HENSON	40
Voluntary Recognition - Collective Agreement - Construction Industry - Judicial Review - Related Employer - Sale of a Business - Board finding that 1966 sale transaction between "old RYCO" and "new RYCO" not giving rise to "successor rights" obligations because 1957 Working Agreement entered into by "old RYCO" was "recognition agreement" and not "collective agreement" - Board declining to declare "old RYCO" and "new RYCO" related employers in circumstances where the companies ceased carrying on related or associated activities or businesses several years prior to enactment of subsection 1(4) of the Act - Sale of business and related employer applications dismissed - Unions' application for judicial review dismissed by Divisional Court	
ROBERTSON-YATES CORPORATION LIMITED AND THE OLRB; RE IBEW, LOCAL 105, PAT, LOCALS 205 AND 1824, UA, LOCAL 67	55

2686-95-R Office and Professional Employees International Union, Applicant v. **Dryden District Roman Catholic Separate School Board**, Responding Party

Certification - Board granting "interim" certification to union on November 6, 1995 in connection with certification application made on October 11, 1995 - Bill 7 providing that amended provisions of Labour Relations Act applying retroactively to certification applications filed after October 4, 1995 in which no "final decision" had yet issued - Board determining that certification decision made on November 6, 1995 a "final decision" for purposes of transitional provisions under Bill 7

BEFORE: Laura Trachuk, Vice-Chair, and Board Members O. R. McGuire and P. V. Grasso.

DECISION OF THE BOARD; January 5, 1996

1. This is an application for certification which was filed with the Board on October 11, 1995. On November 6, 1995 the Board (differently constituted) certified the applicant for a bargaining unit of employees of the responding party described as follows:

all employees of the Dryden District Roman Catholic Separate School Board in the District of Kenora, save and except Superintendents, persons above the rank of Superintendent, Teachers, Occasional Teachers, the Executive Secretary to the Director of Education, and pending resolution by the Board, excluding as well, the Secretary to the Superintendent of Business.

- 2. The bargaining unit described above was certified pursuant to the Board's discretion under what was then section 6(2) of the *Labour Relations Act* and is now section 9(2). That section reads:
 - 9. (2) Where, upon an application for certification, the Board is satisfied that any dispute as to the composition of the bargaining unit cannot affect the trade union's right to certification, the Board may certify the trade union as the bargaining agent pending the final resolution of the composition of the bargaining unit.

[emphasis added]

- 3. On November 10, 1995, subsequent to the Board's decision but possibly prior to the parties' receipt of it, the *Labour Relations Act*, 1995 received Royal Assent. The "new Act" took retroactive effect as of October 4, 1995, and was accompanied by certain transitional provisions which might potentially have application to this matter. Those transitional sections are contained in the *Labour Relations and Employment Statute Law Amendment Act*, 1995 and provide:
 - **3.** (1) This section applies with respect to proceedings commenced under the old Act in which a *final decision* has not been issued on the day on which this section comes into force.
 - (2) A proceeding continuing after the new Act comes into force shall be decided as if the new Act had been in force at all material times. The presiding person or body shall apply the substantive provisions of the new Act as well as the procedural rules established under it.

[emphasis added]

4. The result of the above sections when read together, is that if the Board's decision to certify the union under section 6(2) was a final decision in the certification proceedings, then the Labour Relations Act, 1995 does not apply retroactively to this application, at least insofar as the right to certification is concerned. If the decision to certify was not a final one, then the "new Act"

applies, and it might then be argued that the Board should reconsider its earlier certification decision and hold a vote to ascertain the wishes of the employees with respect to the certification issue.

- 5. As a result of these legislative changes, the Board directed the parties to file written submissions "with respect to what, if any, application the transitional provisions" might have to this application. The Board has now reviewed the parties' submissions and the cases referred to therein. The Board has determined that the "transitional provisions" do not apply to this application, because the Board's decision certifying the union on November 6, 1995 was a final decision in this certification proceeding.
- In our view, the meaning to be attributed to the term "final" must be considered in the 6. context of the statutory framework of which section 9(2) is a part, having regard to the purpose that that section was designed to accomplish. Under the scheme of the Labour Relations Act that was in place until November 10, 1995, a trade union could be certified as the representative of a bargaining unit of employees, if it could show that more than 55% of the employees in that bargaining unit were its members or had applied to become its members. Certification turned upon a showing of support from a clear majority of the employees. Section 6(2) made it possible to certify the union as the representative of the employees even where there was an outstanding dispute about the precise description of the bargaining unit, providing there was no doubt that the union had the requisite level of membership support to be entitled to certification regardless of the disposition of that dispute. The Board sometimes referred to this colloquially as certification "on an interim basis" because that is how the parties often referred to it. But those words do not appear in the statute and it is clear from both the language of section 9(2) and the general framework, that for the purposes of the Act, the decision to certify under section 9(2) is a "final" determination of the union's right to represent the named group of employees. Under what is now section 114 of the Act the certification determination is "final and conclusive for all purposes" and if a party believed that the Board had erred, it would have to either seek reconsideration of the decision under section 114(1) or apply for judicial review.
- 7. Under the "new Act", the Board retains the power to certify a trade union on the same basis as it did before (i.e. where the right to certification cannot be affected by the dispute about the bargaining unit perimeter), except that now the requisite level of support is 50% of those participating in a representation vote. The union can be certified as the representative of employees even if there is an outstanding dispute about the bargaining unit, so long as the ballots cast by the individuals in the disputed positions cannot affect the outcome of the vote. The legislative intention that minor disputes about bargaining unit configuration will not stand in the way of certification and collective bargaining has therefore not changed.
- 8. The present application is a case in point. In this case there was only one individual whose status was in dispute. The union's majority support, and thus its right to certification, did not turn upon the inclusion or exclusion of that individual. Accordingly, the Board certified the union and excluded the disputed person until that matter was either settled between the parties or dealt with by the Board itself. Whether or not the disputed individual was in or out of the unit (i.e. whether her functions were caught by section 1(3) of the Act), the union was "certified" to represent the described bargaining unit, because its ultimate right to certification was not in issue. There was nothing tentative, provisional or conditional about that certification determination.
- 9. The "finality" of a certification under section 6(2) (now 9(2)) is obviously not an issue which the Board could previously have considered in the context of the current transitional provisions. However, the scheme of the Act is predicated upon the assumption that this kind of decision is final for statutory purposes, and that once certified the union assumes the role and responsibili-

ties of bargaining agent. Indeed, the whole purpose of section 6(2) (added to the Act in 1975) was to permit a final certification decision to be made so that bargaining could get underway, even when there was an outstanding dispute concerning the bargaining unit description or composition.

- 10. Once a trade union is certified under section 9(2), it is entitled to give notice to bargain under section 16 of the Act. Upon certification, including certification under section 9(2), the parties have an obligation under section 17 to begin bargaining. The rest of the Act's provisions with respect to collective bargaining are also triggered: the parties are obliged to bargain in good faith; conciliation may be sought; a strike or lock-out may ensue; first contract arbitration may be applied for, and so on. Under the *Labour Relations Act* there is no difference between certification under what is now section 9(2) or under what is now section 10(1). In either case, the union is declared to be the exclusive bargaining agent for a named group of employees, and has all of the statutory rights, privileges and duties of a certified bargaining agent, including the duty of fair representation (section 74).
- 11. The power to certify under section 9(2) recognizes the need for expedition when a union and an employer enter into their new bargaining relationship and further that this relationship should not be delayed by an outstanding dispute which cannot affect it. (See University of Ottawa, [1975] OLRB Rep. Sept. 694 and Mississauga Public Library Board, [1976] OLRB Rep. Feb. 1.) The only respect in which anything flows from the issuance of the actual certificate is that the Board has held that the date upon which an application for termination may be filed is one year after it has issued. (See Comstock Funeral Home, [1982] OLRB Rep. Oct. 1436). The Board decided on the facts of that case that the parties could not actually enter into a collective agreement as long as the bargaining unit description was outstanding and that it would be prejudicial to the union for it to be subject to termination before it can even enter into a collective agreement. The Board's decision in Comstock, supra, therefore, is not inconsistent with the fact that the union's right to certification has been finally decided when it is certified under section 6(2) (now 9(2)). In any case, as the issue before the Board in Comstock, supra, was different than the one before us now, the Board need not assess the analysis therein or determine whether it remains applicable.
- Unlike the Board, the Court has had numerous opportunities to decide when a decision is "final", and both parties referred us to that jurisprudence. (See *Hendrickson v. Kallio* [1932] O.R. 675; *Frederick et al v. Aviation & General Insurance Co. Ltd.* [1966] 2 O.R. 356; *Delaney Boat Lines and Services Ltd. et al v. City of Barrie* (1976) 15 O.R. (2d) 675; *Wigle et al v. Allstate Insurance Co. of Canada* (1984) 49 O.R. (2d) 101; *Mackay et al v. Queen Elizabeth Hospital et al* (1989) 68 O.R. (2d) 90; *Buck Brothers Ltd. v. Frontenac Builders Ltd.* (1994) 18 O.R. (3d) 97; *Ball v. Donais* (1994) 13 O.R. (3d) 322.) The Court (generally the Court of Appeal) has had to decide whether certain decisions are "final" or interlocutory in the context of deciding whether an appeal lies as of right or only with leave. If a decision is considered final, an appeal lies as of right.
- 13. The Court's approach as illustrated by the cases cited by the parties is that a "final decision" in a proceeding is a decision which finally determines the central issue between the parties, or which finally determines one of the parties' substantive rights. On that approach, the Board's certification of a trade union pursuant to section 6(2) (now 9(2)) must be considered a "final" decision, because the central issue in an application for certification is whether the trade union is entitled to represent the employees in the bargaining unit. A certification decision under section 9(2) settles that question. Once it has been determined that the bargaining unit issue cannot affect the right to certification and the certification decision is made, the outstanding unit dispute becomes collateral and subsidiary.

- 14. The determination that the trade union has sufficient support for certification and the consequent certification under section 9(2) is a final decision with respect to its substantive right to certification (as the words of sections 9(2) and 114(1) specify) and there can be no further adjudication of that issue. Although as an administrative matter the Board has not typed and issued a formal "certificate" until the bargaining unit dispute has been resolved, the decision that the Board renders under section 6(2) (now 9(2)) does *certify* the applicant, which then assumes the role of certified bargaining agent.
- 15. In order to hold a vote in this matter as the employer now requests, the Board would have to reconsider its decision of November 6 certifying the union and revoke the applicant's certification. That such further decisions would be necessary underscores the finality of the Board's earlier decision.
- 16. For all of the above reasons, the Board finds that this application is not affected by the transitional provisions of the *Labour Relations Act*, 1995.

0215-95-R; **0236-95-R** Kevin Smith and Clifford Wilkinson, Applicants v. International Union of Operating Engineers, Local 793, Responding Party v. Elirpa Construction and Materials Limited, Intervenor

Charges - Construction Industry - Employee - Employer Initiation - Intimidation and Coercion - Termination - Board rejecting union's argument that newly enacted subsection 63(16) of the Act confirming Board's historical practice of requiring applicant in termination proceedings to establish voluntariness of petition - Board expressing view that hearing under subsection 63(16) should be convened only where allegations of misconduct have been pleaded in such a manner as to establish *prima facie* case of employer initiation or employer threats and coercion - Board considering relevance of rule in *April Waterproofing* case after Bill 7 and concluding that union may still allege in termination application that one or more employees on the application date had been hired contrary to the collective agreement and therefore unable to properly cast a ballot in a representation vote

BEFORE: Lee Shouldice, Vice-Chair.

APPEARANCES: Martin Z. Rosenbaum for the applicants; Bernard Fishbein for the responding party; Richard Anstruther for the intervenor.

DECISION OF THE BOARD; January 24, 1996

I. Introduction

These are two applications for a declaration terminating bargaining rights in the construction industry. Board File 0215-95-R relates to an application filed with the Board on April 18, 1995 in which the applicants ask the Board, pursuant to what was then section 58(1) of the *Labour Relations Act* (hereinafter "the old Act"), to declare that the responding party (hereinafter referred to as "Local 793") no longer represents the employees in the bargaining unit for which it is the bargaining agent. Pursuant to a certificate issued by the Board on January 31, 1986, Local 793 represents the employees of the intervenor (hereinafter referred to as "the employer") in all

sectors of the construction industry, save and except the I.C.I. sector, in Board Area 8. The application in Board File 0215-95-R relates to the roads sector of the construction industry. Local 793 has never concluded a collective agreement with the employer with respect to this sector of the construction industry.

- 2. Board File 0236-95-R relates to an application filed with the Board on April 19, 1995 in which the applicants ask the Board, pursuant to section 58(2) of the old Act, to declare that Local 793 no longer represents the employees in the bargaining unit for which it is the bargaining agent. This particular application relates to the sewers and watermain sector of the construction industry. As a result of an accreditation order of the Board (see *Metropolitan Toronto Sewer and Watermain Contractors Association*, [1989] OLRB Rep. Dec. 1226), the employer is bound to a collective agreement negotiated between the Metropolitan Toronto Sewer and Watermain Contractors Association and Local 793, effective August 4, 1992 until April 30, 1995. The collective agreement in question has as its geographic ambit Board Area 8, and the County of Simcoe, which is part of Board Area 18.
- 3. These two matters came on for hearing before this panel of the Board on October 17, 1995. At that time, certain preliminary matters were dealt with and the applicants proceeded to call their evidence in support of the applications. In both Board files, Local 793 asserts that the applications were not voluntary, and takes the position that the applicants are required to establish their voluntariness before the Board can grant the declarations requested. When provided with an opportunity to particularize its allegations of involuntariness, counsel for Local 793 conceded that the union had no evidence of any improprieties committed by the applicants or the employer. In Board file 0236-95-R, Local 793 asserts that all four of the individuals on the list of employees are not properly on that list, on the basis of the Board's decision in *April Waterproofing Ltd.*, [1980] OLRB Rep. Nov. 1577.
- 4. On the first day of hearing, counsel for the applicants completed the examination-inchief of Mr. Kevin Smith, one of the applicants. Counsel for Local 793 was to cross-examine Mr. Smith when this matter resumed on November 20 and 21, 1995. However, on November 10, 1995, the Labour Relations and Employment Statute Law Amendment Act (S.O. 1995, c.1) was given Royal Assent. Amongst other things, this legislation (hereinafter referred to as "Bill 7") repeals the old Act and enacts the Labour Relations Act, 1995 (hereinafter referred to as the "Act") in its stead. At the outset of the resumption of the hearing on November 20, 1995, some discussion ensued regarding the effect of the Bill 7 amendments on how the parties should proceed on these matters. The parties agreed to argue two particular points affecting these proceedings: first, whether the effect of the Bill 7 amendments is to eliminate the need for applicants in termination applications to establish the voluntariness of the petition documents filed with the Board (and, as a corollary to that issue, whether the onus and/or burden of proof respecting allegations of employer initiation of the application or threats, coercion or intimidation in connection with the application lies on the applicant or the union in a termination application). Secondly, the parties addressed the issue of whether the Board's jurisprudence reflected by the April Waterproofing Ltd. decision is in any way altered or affected by Bill 7.

II. Relevant Statutory Provisions

5. The pertinent provisions of the old Act referred to during argument are the following:

58.- (1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 62, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

- (2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 62, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,
 - (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;
 - (b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be;
 - (c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.
- (3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at the time that is determined under clause 105(2)(j.1) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.
- (4) If on the taking of the representation vote more than 50 per cent of the ballots cast are cast in opposition to the trade union, the Board shall declare that the trade union that was certified or that was or is a party to the collective agreement, as the case may be, no longer represents the employees in the bargaining unit.
- (5) Upon an application under subsection (1) or (2), where the trade union concerned informs the Board that it does not desire to continue to represent the employees in the bargaining unit, the Board may declare that the trade union no longer represents the employees in the bargaining unit.
- (6) Upon the Board making a declaration under subsection (4) or (5), any collective agreement in operation between the trade union and the employer that is binding upon the employees in the bargaining unit ceases to operate forthwith.

- 6. Similarly, the pertinent provisions of Bill 7 and the Act referred to in argument are the following:
 - 3. (2) A proceeding continuing after the new Act comes into force shall be decided as if the new Act had been in force at all material times. The presiding person or body shall apply the substantive provisions of the new Act as well as the procedural rules established under it.

**

63. (1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 67, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

- (2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 67, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,
 - (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;
 - (b) in the case of a collective agreement for a term of more than three years, only after the commencement of the 35th month of its operation and before the commencement of the 37th month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be;
 - (c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms of either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.
- (3) The applicant shall deliver a copy of the application to the employer and the trade union by such time as is required under the rules made by the Board and, if there is no rule, not later than the day on which the application is filed with the Board.
- (4) The application filed with the Board shall be accompanied by a list of the names of the employees in the bargaining unit who have expressed a wish not to be represented by the trade union and evidence of the wishes of those employees, but the applicant shall not give this information to the employer or trade union.
- (5) If the Board determines that 40 per cent or more of the employees in the bargaining unit appear to have expressed a wish not to be represented by the trade union at the time the application was filed, the Board shall direct that a representation vote be taken among the employees in the bargaining unit.
- (6) The number of employees in the bargaining unit who appear to have expressed a wish not to be represented by the trade union shall be determined with reference only to the information provided in the application and the accompanying information provided under subsection (4).
- (7) The Board may consider such information as it considers appropriate to determine the number of employees in the bargaining unit.
- (8) The Board shall not hold a hearing when making a decision under subsection (5).
- (9) Unless the Board directs otherwise, the representation vote shall be held within five days (excluding Saturdays, Sundays and holidays) after the day on which the application is filed with the Board.
- (10) The representation vote shall be by ballots cast in such a manner that individuals expressing their choice cannot be identified with the choice made.
- (11) The Board may direct that one or more ballots be segregated and that the ballot box containing the ballots be sealed until such time as the Board directs.
- (12) After the representation vote has been taken, the Board may hold a hearing if the Board considers it necessary in order to dispose of the application.
- (13) When disposing of an application, the Board shall not consider any challenge to the information provided under subsection (4).

- (14) If on the taking of the representation vote more than 50 per cent of the ballots cast are cast in opposition to the trade union, the Board shall declare that the trade union that was certified or that was or is a party to the collective agreement, as the case may be, no longer represents the employees in the bargaining unit.
- (15) The Board shall dismiss the application unless more than 50 per cent of the ballots cast in the representation vote by the employees in the bargaining unit are cast in opposition to the trade union.
- (16) Despite subsections (5) and (14), the Board may dismiss the application if the Board is satisfied that the employer or a person acting on behalf of the employer initiated the application or engaged in threats, coercion or intimidation in connection with the application.
- (17) Upon an application under subsection (1) or (2), where the trade union concerned informs the Board that it does not desire to continue to represent the employees in the bargaining unit, the Board may declare that the trade union no longer represents the employees in the bargaining unit.
- (18) Upon the Board making a declaration under subsection (14) or (17), any collective agreement in operation between the trade union and the employer that is binding upon the employees in the bargaining unit ceases to operate forthwith.

III. Decision

(a) Voluntariness

- 7. Counsel directed much of their argument towards the meaning and effect of many of the substantive provisions contained in section 63 of the Act. Bill 7 is new legislation, and to a great extent reflects a new point of departure for labour relations in Ontario. In my view, it would be inappropriate to comment on matters which, strictly speaking, are not before this panel of the Board for decision. With that being said, I will now address the two issues raised for determination in this proceeding.
- 8. As noted above, Bill 7 reflects a new point of departure for the Board, specifically with respect to applications for certification and for termination of bargaining rights. Historically, any bargaining unit employee who desired to terminate the bargaining rights of a trade union was required to apply to the Board for a declaration that the trade union no longer represented the employees in the bargaining unit. For such an application to be successful, it had to be supported by evidence in writing that not less than 45 per cent of the employees in the bargaining unit no longer wished to be represented by the trade union. Significantly, the old Act, in section 58(3), required the Board to ascertain, amongst other things, whether those who had signified their desire to no longer be represented by the trade union had done so voluntarily. Only if the Board was satisfied that the written evidence in support of the application (typically referred to as a "petition") was voluntary in nature was the Board authorized by the old Act to further satisfy itself, through the vehicle of a representation vote, that a majority of the employees in the bargaining unit desired to terminate the right of the trade union to bargain on their behalf.
- 9. As a practical matter, any employee who brought an application for the termination of bargaining rights was required by the Board to establish that the origination, preparation and circulation of the petition documentation supporting the application was free of actual or perceived management interference. In a typical proceeding, the proponents of the application would proceed to call their evidence first. They would be required to establish, on the balance of probabilities, that the origination of the petition document, its preparation, and its circulation were not in

any way influenced by management, or the perception of management involvement. If the applicant or applicants could not clearly establish the voluntariness of the petition document for any reason, the application would not be successful. Actual employer involvement, perceptions by employees that the fact of their signing or not signing a petition could possibly be communicated to management, gaps in the custody of the petition, or a failure to explain the circumstances of the signing of any of the names on the petition document would usually lead the Board to doubt the voluntariness of the signatures on the petition document and dismiss the application.

- Section 63 of the Act does not contain a provision such as that in the old Act which requires the Board to ascertain, prior to the ordering of a representation vote, that 45 per cent of the employees in the bargaining unit have voluntarily signified their desire to terminate the bargaining rights of their trade union. Instead, section 63 of the Act establishes a structure for the termination of bargaining rights which is centred on the taking of a representation vote shortly after the filing of an application for termination of bargaining rights. In essence, the provisions of section 63 of the Act require the Board in a typical case to direct the taking of a representation vote of the employees in the bargaining unit if it determines that 40 per cent or more of the employees in the unit "appear to have expressed a wish not be represented by the trade union at the time the application was filed". The determination made by the Board of the number of employees in the bargaining unit who appear to have expressed a wish not to be represented by the trade union is to be made solely by reference to information provided in the application and a list of names of the employees in the bargaining unit who have expressed a wish not to be represented by the trade union which is to be filed by the applicant. Quite simply, at this early stage of the process, the Act does not anticipate an inquiry into the voluntariness of the documentation supporting the application. In the typical case, if it appears to the Board that 40 per cent of the employees in the bargaining unit have expressed a wish to not be represented by the trade union, a representation vote is to be directed by the Board.
- 11. The Act does, however, anticipate that a hearing may be necessary to dispose of a termination application. There may well be numerous issues relating to the application which will require a hearing to resolve. One of the issues may be the effect of employer misconduct in connection with the application.
- 12. In that regard, reference must be had to the terms of section 63(16) of the Act. This provision, which was not present in the first reading version of Bill 7, provides as follows:

Despite subsections (5) and (14), the Board may dismiss the application if the Board is satisfied that the employer or a person acting on behalf of the employer initiated the application or engaged in threats, coercion or intimidation in connection with the application.

The question which arises on the facts of these applications is whether this provision confirms the Board's historical practice; i.e. that an applicant in a termination proceeding must establish the voluntariness of the written documentation filed with the Board in support of the application, as described above.

On balance, I am satisfied that the Act does not anticipate that such an enquiry into the voluntariness of the origination, preparation and circulation of the underlying supporting documentation is to be undertaken by the Board. It is significant that the Act no longer requires the Board to ascertain the voluntariness of the application or of the supporting materials filed with the application prior to the taking of the representation vote. Presumably, the direction by the Board that a representation vote be taken (within five days, excluding Saturdays, Sundays, and holidays, unless directed otherwise) will permit those voting to express their desires respecting trade union representation freely, without employer interference, and have the effect of "cleansing" any

potential involuntariness of the nature which may have historically caused the Board some concern. Accordingly, I am of the view that it is no longer necessary for an applicant in a termination proceeding to establish that the wishes of those who have expressed a desire to terminate the bargaining rights of a trade union have been expressed "voluntarily", in the broad sense historically required by the Board. This conclusion is qualified, however, by the provisions of section 63(16) of the Act.

- 14. Section 63(16) of the Act anticipates that certain employer conduct *will* permit the Board to dismiss an application for termination of bargaining rights. Section 63(16) of the Act does not direct the Board to dismiss the application in all such cases, but rather provides the Board with the discretion to dismiss the application if it is satisfied that the employer or a person acting on behalf of the employer initiated the application, or engaged in threats, coercion or intimidation in connection with the application.
- 15. Argument was entertained from counsel respecting the meaning and scope of this provision. Counsel for Local 793 asserted that the provision should be read to require the applicant, in every termination application, to satisfy the Board that the application was not initiated by the employer (or an agent) or that the employer did not engage in threats, coercion or intimidation in connection with the application. Counsel conceded that such an inquiry would be somewhat more abridged than that typically engaged in under the old Act, but observed that to require the responding party to assert allegations of misconduct would put the responding party in a difficult position as it would often be the case that the trade union would be unaware of the events constituting improper employer initiation, threats, coercion or intimidation.
- Although I have some sympathy with the practical difficulties alluded to by counsel for Local 793, I do not believe that the legislation anticipates that a hearing will be held in each and every case in order for the applicant to establish that the application was not initiated by the employer, and that there were no employer threats, coercion or intimidation in connection with the application. A petitioning employee may well be (but need not necessarily be) just as ignorant about employer threats, coercion or intimidation against other employees as the trade union may be about that same conduct. To require an applicant in each application to positively establish a lack of employer threats, coercion or intimidation with respect to each person who supports the application may well be impossible; realistically, the best the applicant could do would be to call evidence to establish that, to the best of his or her knowledge, no such employer conduct was communicated to him or her. Although this same difficulty is not apparent with respect to the statutory prohibition on employer initiation, there is questionable utility in convening a hearing solely for the purpose of hearing the applicant testify as to whether the application was his or her idea.
- 17. As a practical matter, the circumstances described by section 63(16) of the Act appear to warrant reference to the old adage that "he who asserts must prove". In my view, the Board should only convene a hearing to deal with the possibility of employer initiation or employer threats, coercion or intimidation in connection with the application should the responding party or an intervenor make allegations of such conduct. The allegations of misconduct should be pleaded in such a manner as to establish a *prima facie* violation of section 63(16) of the Act. This level of particularity of pleading may be, as was pointed out by counsel for Local 793, difficult in some circumstances, and it may well be that enquiries will have to be made by trade union representatives in receipt of termination applications to satisfy themselves that no employer wrongdoing has occurred. This is not meaningfully different from the type of investigation trade unions regularly engage in when ascertaining whether other sections of the Act have been violated by an employer. However, it is insufficient, in my view, to merely plead in response to an application for termination of bargaining rights that the employer initiated the application, or engaged in threats, coercion

or intimidation in connection with the application, and then require the applicant to disprove those bald allegations at a hearing. If the trade union wishes to assert that section 63(16) of the Act applies to the application, it must particularize those allegations with some degree of specificity, and it must be prepared to attend at the hearing and call evidence to support its allegations.

18. No such allegations have been made in these cases. In accordance with section 3(5) of Bill 7, that portion of these proceedings consisting of the inquiry respecting voluntariness of the petition documentation is hereby terminated, as it would serve no practical purpose to continue with the hearing on that issue.

(b) Applicability of April Waterproofing Ltd.

- Having considered fully the argument of counsel, I am satisfied that the Board's juris-prudence reflected by the decision of *April Waterproofing Ltd.*, *supra*, and the cases that have followed and/or qualified the applicability that decision are not affected in any way by the passage of Bill 7. Distilled to its absolute core, the *April Waterproofing Ltd.* decision stands for the proposition that "employees illegally hired contrary to the terms of an existing collective agreement should not be considered to be employees in the bargaining unit even though their hiring was inadvertent and not intended to foster a representation application" (see *Culliton Brothers Limited*, [1983] OLRB Rep. Mar. 339 at para. 21). The applicability of this proposition is in issue in Board File 0236-95-R, as noted above.
- The provisions of section 63 of the Act do not in any way suggest that the Legislature intended to limit the applicability of the principle established by the Board in *April Waterproofing Ltd*. In fact, if anything the Act underscores the significance of being an employee in the bargaining unit for the purposes of the representation vote. Section 63(2) of the Act provides that an employee "in the bargaining unit" defined by the collective agreement may apply for a declaration that the trade union in question no longer represents "the employees in the bargaining unit". As noted above, the Board is required by virtue of section 63(5) of the Act to direct a representation vote "among the employees in the bargaining unit" if it is determined that 40 per cent or more of the "employees in the bargaining unit" appear to have expressed a wish not to be represented by the trade union at the time of application. In the normal course, if on the taking of the representation vote more than 50 per cent of the ballots cast are cast in opposition to the trade union (it being kept in mind that only employees in the bargaining unit are entitled to vote), the Board will declare that the trade union no longer represents the employees in the bargaining unit.
- 21. One of the underlying concerns of the Board in establishing the principle set out in April Waterproofing Ltd. was that an employer not be permitted to rely upon its own (intentional or unintentional) act of violating the collective agreement to facilitate the termination of bargaining rights of an incumbent trade union. The unfairness of such a situation is obvious. There is nothing contained in Bill 7 that suggests that the Legislature intended to alter the Board's jurisprudence reflected by the decision of April Waterproofing Ltd. In my view, it is still open for the responding party to allege in a termination application that one or more of the employees on the date of application has been hired contrary to the terms of the applicable collective agreement, and therefore unable to properly cast a ballot in a representation vote.
- 22. Of course, the structure of the Act will not, in such circumstances, preclude the taking of a representation vote upon receipt by the Board of the application. As a result of the combined effect of sections 63(4), (5), (6), (7), (8) and (13) of the Act, in the normal course the *April Water-proofing Ltd.* issue will now arise *after* the taking of the representation vote and cannot preclude the taking of that vote. However, should a responding party identify the issue prior to the vote, the Board can direct that the ballots of challenged individuals be segregated and the ballot box sealed

so as to ensure that only those properly entitled to vote are ultimately provided with that opportunity.

23. For the reasons set out above, I am of the view that the hearing in Board File 0236-95-R may continue for the purpose of calling evidence relating to the *April Waterproofing Ltd.* issue raised by Local 793.

IV. Disposition

By way of decision dated November 24, 1995 the Board directed that a representation vote be held in each of these two Board files. Representation votes were, in fact, conducted by the Board on December 4, 1995. The decision of the Board directed that the ballot boxes in both Board files be sealed until otherwise directed by the Board. It would appear, however, that in error (but with the consent of the parties) the ballot box in Board File 0215-95-R was opened, and the ballots counted, after the vote was conducted. As the only issue remaining for consideration in Board File 0215-95-R was that of voluntariness, which issue has been disposed of by this decision, it is convenient to determine that proceeding and make the appropriate declaration herein.

(a) Board File 0215-95-R

- 25. No statement of desire to make representations has been filed with the Board within the time fixed by the Board following the taking of the representation vote pursuant to the Board's direction of November 24, 1995.
- 26. On the taking of the representation vote directed by the Board, more than fifty per cent of the ballots cast by employees in the bargaining unit were cast in opposition to the responding party.
- 27. The Board declares that the responding party no longer represents the employees of Elirpa Construction and Materials Limited in the roads sector of the construction industry for whom it has heretofore been the bargaining agent.
- 28. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

(b) Board File 0236-95-R

29. With respect to Board File 0236-95-R, the hearing of that proceeding will continue for the purpose of dealing with the remaining issues on hearing dates convenient to the parties. The Registrar is directed to contact the parties and schedule one or more hearing dates for the continuation of this proceeding.

3401-95-R Law Development Group, Applicant v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Responding Party

Construction Industry - Fraud - Termination - Union certified following failure of employer to respond to application - Employer subsequently seeking to terminate bargaining rights for alleged fraud - Employer alleging that union filed membership evidence on behalf of employees who were not its employees - Employer's application dismissed for failure to make out *prima facie* case

BEFORE: M. A. Nairn, Vice-Chair, and Board Members W. H. Wightman and P. V. Grasso.

APPEARANCES: Joseph Liberman, Adrian Miedema and Richard Law for the applicant; David Watson, Walter Tracogna and Ucal Powell for the responding party.

DECISION OF THE BOARD; January 25, 1996

- 1. This is an application under section 64 of the *Labour Relations Act*, 1995 seeking to terminate the bargaining rights of the responding party. The applicant ("Law" or the "employer") alleges that the certificate obtained by the responding party (the "trade union") was obtained by fraud.
- 2. We heard a number of preliminary objections. We ruled orally that, regardless of the other matters raised, we were not satisfied that the allegations set out in the application, even if true and provable, were facts from which we would infer a fraud as contemplated by that term in section 64 and we dismissed the application. These are our reasons.
- 3. The trade union applied to be certified in June, 1995. By decision dated July 12, 1995 the trade union was certified for a bargaining unit in the construction industry; both ICI and non-ICI in Board Area 8. That decision notes that the employer did not respond to the application.
- 4. By letter dated July 24, 1995, the employer sought reconsideration of the decision certifying the trade union on the basis that it did not receive notice of the application, did not employ carpenters on the application date, and was also therefore not the proper named responding party. A hearing was convened and a decision issued finding that the employer had received notice of the application but had not acted to respond to it. That panel noted that there was nothing being raised which could not have been raised before, and in light of the finding on notice, the reconsideration request was dismissed.
- 5. The fraud alleged in this application is the assertion that the trade union filed membership evidence on behalf of employees that it knew were not employees of Law. The trade union asserts that this is no more than the question of who is the proper employer; an issue that is often raised and dealt with in the context of a certification application, particularly in the construction industry. Although Law attempted to distinguish these as separate issues, we see no difference. Membership evidence itself is not employer specific. We note there was no dispute that there were carpenters performing work on Law's jobsite on the date of application, or that the membership evidence filed represented an expression of the wishes of employees to be represented by the trade union. The dispute is whether or not Law was the employer of those employees.
- 6. In the application for certification the trade union identified Law Development Group as the employer of the employees on whose behalf it had filed evidence of membership. It was

pleaded on the face of the application. The trade union also provided the Board with the necessary information with which to serve the application on Law. As noted in the decision dismissing the request for reconsideration it was not disputed by Law that notice of the application was received. One of its Vice-Presidents caused the notice to employees to be posted on the job site. He testified that he did not realize that the application was in respect of Law, although we note that even the notice to employees references Law both as the responding party to the certification application and as the employer of employees affected.

- 7. We accept the trade union's argument that the adversarial process contemplated by the legislation and the Board's processes requires a party to challenge any matter it disputes when faced with the assertion. The trade union did not attempt to hide or misrepresent its intentions in the certification application. It is clear from the application that the trade union was asserting (whether knowingly or by mistake) that Law employed carpenters on the date of application. If Law was of the view that it did not employ carpenters on the date of the certification application, it was incumbent on it to raise that issue in a response to the certification application. In fact, it did raise the issue in the request for reconsideration.
- 8. The Board has stated that in order to establish a fraud, it "must be demonstrated that a false representation was made to the Board which the Board relied on and also that the representation was known, or ought reasonably to have been known by the purveyor thereof to be false". See *Ontario Taxi Association 1688*, [1981] OLRB Rep. Sept. 1280 at paragraph 19. The cases where fraud has been found generally involve questions concerning membership evidence filed; where, because of the confidentiality provisions in the legislation, a responding party does not have the same opportunity to challenge that evidence.
- 9. Even assuming the trade union had information that Law was not the employer of the employees in question, Law was given notice of the trade union's application at the behest of the trade union; ensuring the very opportunity to dispute the assertion and have it sorted out, if necessary, through the normal certification process. It would be inappropriate to require, as the applicant suggested, some kind of "due inquiry" test of a trade union. Often, particularly in the construction industry, the real employer is unclear at best, and involves mixed questions of fact and law.
- 10. Similarly, a trade union asserts the number of employees it believes to be in the bargaining unit sought (both in the application and in the A-80 declaration). That too is an issue that is resolved through the normal processes of a certification application if disputed by a responding party. The applicant acknowledged that section 64 would not apply so as to conclude that a certificate had been obtained by fraud in circumstances where the trade union, even knowingly, asserted the incorrect number of employees in the proposed bargaining unit. In our view that issue is no less "fundamental" to a certification application (as the applicant here asserted) than the issue of the proper employer, and both are evident to a responding party from a review of the information asserted in the application.
- In essence, the Board does not rely on the representation (or misrepresentation) of an applicant trade union as to the employer of the employees sought to be represented, except in the absence of a response from the named employer. The named employer has, and in this case had, the opportunity and obligation to respond; to raise matters within its knowledge which it disputes. A failure to respond cannot change the character of the Board's then reliance on the trade union's information to amount to a fraud on the Board within the meaning of section 64. Or, to put it slightly differently, these are not facts which would justify finding or inferring fraud in respect of the trade union's conduct.

- 12. Section 64 is also a discretionary remedy. Assuming again that the allegations are true and provable, we would not exercise our discretion in these circumstances to set aside the certificate obtained for much the same reason as we would not be prepared to infer fraud. The trade union named Law in its application for certification, provided the information with which to provide Law with notice of the application, and filed membership evidence on behalf of employees signifying their desire to be represented by the trade union. Law had the opportunity to respond and failed to do so. To the extent Law asserts a misrepresentation on the part of the trade union, it was one that was apparent on receipt of the application and certainly no later than receipt of the Board's decision certifying the applicant. A request for reconsideration was filed and dismissed. The only difference is that Law now asserts that the misrepresentation was made knowingly by the trade union. That alone is insufficient, given the other circumstances, to warrant reviewing that issue some six months after bargaining rights have been established.
- 13. The Board has stated that section 64 should not be expanded to include allegations which can be filed under other sections of the Act. See for example, *Easy Enterprises Inc.*, [1987] OLRB Rep. July 994. The issue of the proper employer of the employees sought to be represented was one which could, and should, have been dealt with as part of the certification application.
- 14. For those reasons, we dismiss the application.

CONCURRING OPINION OF BOARD MEMBER W. H. WIGHTMAN; January 25, 1996

- 1. As noted in the main body of the decision the employer in this matter did not respond to the original application. The problems now facing Law Development Group flow from that act of omission.
- 2. From the viewpoint of Richard Law, the central problem is that Law Development Group finds itself bound to a collective agreement with the carpenters union covering ICI and non-ICI construction. Since Law Development Group claims never to have had any employees, past or present, it might seem of no consequence to be so bound. In fact even if indeed the company has no employees, nor any intention of employing craftsmen directly, being bound to the collective agreement will have considerable impact on its ability to act as a general contractor.
- 3. I regard it as anomalous that a correct interpretation of the law should result in a company with no employees being bound to a collective agreement and do not believe this would have been the legislative intent.

3616-95-R National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Applicant v. Manac, A Division of the Canam Manac Group Inc., Responding Party

Bargaining Unit - Certification - Subsequent to taking of representation vote (in which more than 50 percent of ballots cast were cast in favour of union), certain employees writing to Board expressing concern that maintenance employees ought not to be included in bargaining unit with production employees as agreed to by employer and union - Board satisfied that employees' representations raising no allegations which would change result of application - Board issuing final decision without a hearing - Certificate issuing

BEFORE: Russell G. Goodfellow, Vice-Chair, and Board Members O. R. McGuire and H. Peacock.

DECISION OF THE BOARD; January 31, 1996

- 1. Pursuant to the Board's direction of January 15, 1996, a representation vote was taken on January 17, 1996.
- 2. The Board has received representations dated January 22, 1996 from an employee on behalf of eight others. Having considered these representations, we are satisfied that they raise no allegations which, even if proved true, would change the result of the application.
- 3. The substance of the employees' concerns is that, as maintenance employees, they ought not to be included in the same bargaining unit as production employees. It is common practice for the Board to include production and maintenance employees in a single bargaining unit. Once included in such a unit, all employees have a statutory right to be represented fairly by the certified bargaining agent. There is no dispute that both categories of employees work in a single plant for the same employer. There is also nothing to suggest that the unit which the applicant seeks to represent, and the responding party agrees is appropriate for collective bargaining, lacks a "sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer (see *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266).
- 4. For these reasons, the Board will issue a final decision in this matter without a hearing.
- 5. Having regard to the agreement of the parties, and our findings above, the Board finds that:

all employees of Manac, A Division of the Canam Manac Group Inc. in the City of Orangeville, save and except Team Leaders and Supervisors, persons above the rank of Team Leader or Supervisor, office, clerical and sales staff, Security Guards and students employed during the school vacation period,

constitute a unit of employees of the responding party appropriate for collective bargaining.

- 6. On the taking of the representation vote directed by the Board, more than fifty per cent of the ballots cast by employees in the bargaining unit were cast in favour of the applicant.
- 7. A certificate will issue to the applicant.
- 8. The Registrar will destroy the ballots cast in the representation vote taken in this matter

following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

- 9. Meeting and hearing dates set previously are hereby cancelled.
- 10. The responding party is directed to post copies of this decision immediately, adjacent to all copies of the "Notice of Vote and of Hearing" posted previously. These copies must remain posted until the date that had been set for the hearing.

3279-95-R Local Union 47 Sheet Metal Workers' International Association, Applicant v. **Maverick Mechanical Contractors Limited**, Responding Party

Construction Industry - Reconsideration - Representation Vote - Board rejecting union's request to schedule second representation vote where vote was held five days after filing of application, but on day that employees not scheduled to work and in circumstances where only one of five eligible voters cast ballot - Board not prepared to draw inference that vote not a true reflection of desires of the employees - Reconsideration application dismissed

BEFORE: Lee Shouldice, Vice-Chair, and Board Members W. N. Fraser and G. McMenemy.

DECISION OF THE BOARD; January 24, 1996

- 1. This is an application for certification. On Friday, December 8, 1995, a representation vote was held in accordance with a decision of the Board (differently constituted) dated December 6, 1995. The ballot box was sealed after the vote was conducted. Subsequent to the taking of the representation vote, counsel for the applicant wrote to the Board identifying certain concerns he had regarding the voting arrangements set by the Board. On December 20, 1995, this panel of the Board rejected the request by the applicant for a second representation vote or for a hearing on the merits of his concerns. By way of letter dated January 10, 1996, supplemented by correspondence dated January 12, 1996, counsel for the applicant requests that the Board reconsider its decision of December 20, 1995.
- 2. This application for certification was filed with the Board by means of Priority Courier on November 30, 1995. The application was physically received by the Board on December 1, 1995. The applicant asserted in its application that the responding party had employed three individuals in the proposed bargaining unit on the date of application. It is not clear from the responding party's response whether the employer asserts there to have been three or five individuals at work in the applicant's proposed bargaining unit on the certification application date. In any event, on the basis of the materials filed by the applicant with the Board, there was sufficient membership evidence to satisfy the Board that 40% or more of the employees in the applicant's proposed bargaining unit had applied for membership in the applicant. Accordingly, the Board directed that a representation vote be taken on December 8, 1995, of those individuals in the voting constituency. At the time that the representation vote was taken, only one individual cast a ballot. The ballot box was sealed. The applicant now asserts that the employees of the responding party do not work on Fridays, and that therefore the representation vote ought not to have been scheduled for December 8, 1995, which was a Friday.

- 3. In support of his request for a second representation vote, counsel for the applicant notes that the requirement that representation votes be taken in each application for certification is "still quite new to all parties", and observes that "a certain amount of time and learning is needed before a proper voting system is developed". Counsel further asserts that to hold a vote on a date on which the eligible voters are not scheduled to work is a denial of their right to vote.
- 4. Furthermore, counsel for the union asserts that the applicant is not responsible for the failure of four of the five eligible voters to cast their ballots on the grounds that the application form (which, it is observed, was filled out by the applicant without the aid of legal counsel) does not request preferred days for the holding of the vote, and does not ask the applicant to identify which days are not appropriate for the holding of the vote. It is submitted that, should the application form have contained the latter question, the applicant would have been alerted to determining which days were not appropriate for a vote. Counsel observes that the applicant did not learn until the evening of Thursday, December 7, 1995 that employees of the responding party did not work on Friday.
- 5. Finally, counsel states that, as the right to freely join a trade union of one's choice is a right protected under the *Charter of Rights and Freedoms*, the issue raised in this proceeding is serious enough to warrant an oral hearing before a panel of the Board, and that to deny such a hearing would be "a denial of natural justice".
- Dealing with counsel's latter submission first, we disagree that the applicant is entitled to an oral hearing before the Board can determine the issue that is raised in this proceeding. Section 110(16) of the Labour Relations Act, 1995, S.O. 1995, c. 1 (hereinafter "the Act") provides that the Board is to determine its own practice and procedure, but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions. Here, we accept as true and provable all of the factual propositions asserted by counsel for the applicant. It is, accordingly, unnecessary to entertain oral evidence from the applicant. Decisions of significance to the immediate parties (and the community at large) are regularly made by the Board without entertaining oral submissions from the parties. Quite simply, it would be impossible for the Board to schedule oral hearings in all proceedings in which "serious" matters or issues were raised, assuming that some objective determination of the "seriousness" of issues could be relied upon which would consider factors beyond the narrow interests of the parties to the particular proceeding. Counsel for the applicant has argued his client's position quite ably, in writing, and in our view an opportunity for him to call evidence and to re-argue his written submissions in person before this or another panel of the Board would be of little assistance to the Board. The determinations made by the Board in these circumstances do not deny the applicant natural justice.
- 7. Proceeding, then, to the substantive issue at hand, it is evident that only one of five eligible voters for the representation vote actually cast a ballot at the designated date and time of the vote. It would appear, based on the correspondence filed by applicant's counsel, that the date of the taking of the vote was not a working day for the employees of the responding party affected by the application for certification. Assuming this to be so, we are not satisfied that it is appropriate to direct that a second representation vote be taken in this proceeding.
- 8. We start our consideration of this issue from the premise that, although the requirement that representation votes be held on every certification application is quite new to the labour relations community, the concept of the "representation vote" is hardly new. Although not the primary method of determining membership strength for the purposes of an application for certification prior to the advent of the Act, the representation vote has been a known commodity in the labour relations community for decades. Furthermore, voluntary applications for a declaration ter-

minating bargaining rights have, for years, been determined solely by the vehicle of a representation vote. Trade unions (particularly, but not exclusively, those in the construction industry) regularly have had to urge those not scheduled to work on the date of the taking of a representation vote to attend at the worksite and cast a ballot. In the construction industry, this has been particularly so since the decision of *Crete Flooring Group Limited* [1992] OLRB Rep. July 792. Accordingly, although there is some truth in the submissions made by counsel regarding the "novelty" of the new certification structure contained in the Act, the preparations historically required by the parties to a certification application which is to be determined by a representation vote are applicable to current day proceedings. That is to say, the applicant can hardly be said to be unaware of how a representation vote is effected, and what is required to succeed upon the taking of a vote.

- 9. There is no doubt that the current certification application form utilized by the Board for applications in the construction industry does not ask the applicant (or the responding party) to identify "preferred" dates or "inappropriate" dates for the taking of the vote. Historically, the Board has canvassed with the parties convenient dates for the taking of representation votes. It is infinitely preferable for the vote to be held at a convenient date and time that permits as many of the eligible individuals to vote as is possible. The time constraints built into the Act now preclude the Board from canvassing the parties for convenient and inconvenient dates for the taking of the vote.
- 10. As a practical matter, and in the absence of special circumstances, the applicant is usually in the position of being able to anticipate roughly when the Board will be directing the taking of the representation vote. The applicant should make inquiries of its members to determine if there are one or more reasons why the taking of a representation vote is inappropriate on any particular day. If so, the Board must be made aware of the dates, and the reasons for the inappropriateness, by the applicant at or immediately after the application is filed with the Board. If the responding party wishes to assert that a particular day is inappropriate for the taking of a vote, it must do so, at the very latest, on the response form which is filed with the Board. Quite simply, it is the responsibility of the party desiring the vote to be scheduled (or not scheduled) on a particular date to advise the Board of its desire. After considering the request or requests of the parties, a panel of the Board will determine the date and time of the vote. The absence of a particular space on the certification application form for such information does not relieve the parties from that responsibility. As the form currently reads, there is more than adequate space on the pleading documents (under the heading "Other Relevant Statements") for such information to be brought to the attention of the Board. We note here that the fact that the form was completed by the applicant rather than its counsel is of no significance; the applicant can hardly be put in a better position than the responding party by not retaining legal counsel to complete its application for certification.
- 11. It may well be that the inclusion, in the certification application forms, of a request for the information identified by counsel for the applicant would have alerted the applicant to the difficulty of having the vote held on a Friday. On the other hand, it may not have had that effect. Either way, it is the responsibility of any applicant which desires to maximize its chance of success in a representation vote to ensure that its supporters are in attendance at the vote and cast their ballots. There is no dispute that the applicant was aware of the date, time and place of the vote no later than Wednesday, December 6, 1995. It had plenty of time to contact its supporters prior to the vote scheduled for the following Friday. If it did not become aware of the nature of the employer's scheduling of work until the Thursday night such lack of knowledge is hardly the fault of the Board. Furthermore, the failure of the individuals eligible to vote to attend at the worksite is hardly the result of a denial by the Board of their right to cast a ballot. Each individual had the right to attend at the worksite and cast a ballot. Four of the five chose not to attend to do so. The

mere election by a group of employees not to exercise their rights under the Act does not raise an inference that the vote is not a true reflection of the desires of the employees (see *Ottawa General Hospital* [1973] OLRB Rep. Oct. 506).

12. For these reasons, we are of the view that it is not appropriate to schedule a second voting day in this proceeding, and the request for reconsideration is hereby denied.

3381-95-R Tracy McLellan, Jennifer Faulkiner, Sharon Haviland, Mary-Lou Reeves, Maxine Rapai, Donna Dempsey, Applicants v. Ontario Public Service Employees Union, Responding Party

Termination - Pleadings demonstrating apparent disagreement between applicant, employer and union concerning number of employees in bargaining unit - Board inviting submissions in view of potential effect on outcome of application

BEFORE: S. Liang, Vice-Chair, and Board Members W. H. Wightman and C. McDonald.

DECISION OF THE BOARD; January 3, 1996

- 1. The name of the responding party in the title of proceedings is amended to read: "Ontario Public Service Employees Union".
- 2. This is an application for termination of bargaining rights, brought pursuant to the provisions of section 63 of the *Labour Relations Act*, 1995.
- 3. The applicant has provided, in accordance with the Board's Interim Certification and Termination Rules, and among other things, a Form T-4 declaration in which it asserts that there were 54 persons employed in the bargaining unit on the application date. The employer has provided, also as required by the Rules, a Schedule "C" of employees in the form set by the Board. Since it is not clear whether or not a copy of this schedule has been provided to the other parties, it has been sent to the union and the applicant along with this decision. On Schedule "C", the employer asserts that there are 56 employees in the bargaining unit.
- 4. In its response, the union states that there are 63 persons in the bargaining unit. There is therefore an apparent difference between the parties as to the number of employees in the bargaining unit for the purposes of this application which *may* affect the outcome of this application. Since it is not clear whether this difference is still outstanding, now that the parties have received each others' materials, the Board finds it appropriate to direct the following information to be provided:
 - (a) The Board directs the union to indicate whether it has a dispute with the Schedule "C" filed by the employer. If it does, the union shall identify which individuals are in dispute *and* provide any documentary evidence it has in support of its position. The union shall deliver these materials to the Board and to the other parties by no later than 5:00 p.m. on Monday, January 8, 1996.

- (b) If the union indicates that it disputes the employer's Schedule "C", the employer and the applicant are directed to state whether they agree or disagree with the union's position, and provide any documentary evidence they have in support of their position. These materials shall be delivered to the Board and to the other parties by no later than 5:00 p.m. on Wednesday, January 10, 1995.
- 5. Upon receipt of these materials, the Board may make determinations under section 63 of the Act, or may make further orders as required.

3381-95-R Tracy McLellan, Jennifer Faulkiner, Sharon Haviland, Mary-Lou Reeves, Maxine Rapai, Donna Dempsey, Applicants v. **Ontario Public Service Employees Union**, Responding Party

Termination - Timeliness - Union writing to Board subsequent to filing response to termination application and asserting that application untimely in view of appointment of conciliation officer - Board inviting other parties' submissions in view of appearance that application untimely

BEFORE: S. Liang, Vice-Chair, and Board Members Orval R. McGuire and K. Brennan.

DECISION OF THE BOARD; January 5, 1996

- 1. This is an application for termination of bargaining rights in which the Board issued a decision dated January 3, 1996 [now reported at [1996] OLRB Rep. Jan. 20] requiring certain information to be provided. Subsequent to that decision further correspondence has come to our attention, also dated January 3, 1996, from counsel for the responding party. The Board notes that a copy of this letter has been sent to the other parties.
- 2. In this correspondence, the responding party ("OPSEU") asserts that this application is untimely because it has been made *after* the appointment of a conciliation officer on December 8, 1995. A copy of the letter from the Ministry of Labour appointing a conciliation officer is attached to the letter.
- 3. It appears from the material provided, and based on the provisions of the Labour Relations Act, 1995, that OPSEU may be correct. The Act sets out certain time periods within which applications for termination of bargaining rights may be made. Section 63(2) states:
 - **63.-** (2) Any of the employees in the bargaining unit defined in a collective agreement may, *subject to section 67*, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

[emphasis added]

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;
- (b) in the case of a collective agreement for a term of more than three years, only after the commencement of the 35th month of its operation and before the commencement of the 37th month of its operation and during the two-

month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be;

(c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.

4. Section 67(2) of the Act states:

67.- (2) Where notice has been given under section 59 and the Minister has appointed a conciliation officer or a mediator, no application for certification of a bargaining agent of any of the employees in the bargaining units as defined in the collective agreement and no application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit as defined in the agreement shall be made after the date when the agreement ceased to operate or the date when the Minister appointed a conciliation officer or a mediator, whichever is later, unless following the appointment of a conciliation officer or a mediator, if no collective agreement has been made,

- (a) at least 12 months have elapsed from the date of the appointment of the conciliation officer or a mediator;
- (b) a conciliation board or a mediator has been appointed and 30 days have elapsed after the report of the conciliation board or the mediator has been released by the Minister to the parties; or
- (c) 30 days have elapsed after the Minister has informed the parties that he or she does not consider it desirable to appoint a conciliation board,

whichever is later.

- 5. It appears that a conciliation officer was appointed on December 8, 1995. Under section 67 therefore, this application cannot be made for *at least* twelve months after December 8 (assuming no collective agreement has been entered into). Although this application is dated December 5, it was sent by ordinary mail and received by the Board December 11. Rule 43 of the Board's Interim Certification and Termination Rules states that the "date of filing is the date that a document is received by the Board." The filing date for the purposes of this application is therefore December 11.
- 6. As a result, based on the material provided by OPSEU, it *appears* that this application is untimely.
- 7. Based on the foregoing, the Board directs the other parties to provide their submissions, if any, as to:
 - a) whether they dispute any of the facts as asserted by OPSEU regarding the appointment of a conciliation officer on December 8;
 - b) whether they dispute the result that arises from these facts and the provisions of the Act;
 - c) in general, whether there is any reason why, based on all the above, the Board ought *not* to dismiss this application without a vote.

These submissions must be provided to the Board and to the other parties by no later than 5:00 p.m. on Wednesday, January 10, 1996. Upon receipt of these submissions the Board may determine whether this application is timely, or may make further orders as necessary.

8. In view of this issue, the Board's decision of January 3 is varied to the extent that it is unnecessary until further notice from the Board to comply with the directions contained therein.

3381-95-R Tracy McLellan, Jennifer Faulkiner, Sharon Haviland, Mary-Lou Reeves, Maxine Rapai, Donna Dempsey, Applicants v. **Ontario Public Service Employees Union**, Responding Party

Practice and Procedure - Termination - Timeliness - Board declining to "waive" rules of procedure providing that termination application considered filed on date that it is received by Board - Board finding termination application untimely in view of appointment of conciliation officer - Application dismissed

BEFORE: S. Liang, Vice-Chair, and Board Members R. McGuire and K. S. Brennan.

DECISION OF THE BOARD; January 31, 1996

- 1. This is an application for termination of bargaining rights. By decision dated January 5, 1996 [now reported at [1996] OLRB Rep. Jan. 21], the Board requested the parties' submissions, if any, on the issue of the timeliness of this application. Having reviewed the submissions received, the Board finds that this application is untimely, for the reasons given below.
- Although the applicants state that they dispute the facts regarding the appointment of a conciliation officer on December 8, 1995, they provide no reasons why the Board ought not to rely on the document dated December 8, 1995, provided by the union. This letter purports to be from the Director of Labour Management Services, Office of Mediation, Ministry of Labour, appointing a conciliation officer pursuant to his delegated statutory authority. Having regard to the submissions of the parties and the Board's powers under sections 111(2)(e) and 121(2) of the Labour Relations Act, 1995, the Board is satisfied that on December 8, 1995, a conciliation officer was appointed within the meaning of section 67(2) of the Act.
- 3. The applicants state that it would be unfair for the Board to find that the application date in this matter is that recognized by the Board's Rules, namely, the date on which it was received by the Board. Both the Board's Rules of Procedure, in effect since January of 1993, and the Interim Certification and Termination Rules, which apply to certification and termination applications filed after November 10, 1995, provide that the date of filing of a document is the date on which that document is received by the Board, with specific exceptions which do not apply here. The Board has the discretion to relieve against the strict application of its rules, but only does so in exceptional circumstances. As much as the applicants feel that the application of the Board's rules to them is unfair, it would also be unfair for the Board to apply its rules unevenly. Inconsistent application of rules can also result in unfairness. We note that on the application form filled out by the applicants, there is a specific reference to the Board's rules, and to the advisability of consulting these rules before filing an application.

- 4. In sum, we find no compelling reason here to waive the application of the Board's rules to vary the filing date of this application.
- 5. On the submissions, it is clear that the applicants' main concern is less the effect of the Board's rules, than the effect of the appointment of a conciliation officer on the timeliness of this application. They allege that the union's motivation in seeking conciliation was precisely to thwart the making of this application. They further allege that this constitutes bargaining in bad faith or other unfair labour practices. The applicants also question whether the appointment of a conciliation officer should have been made. On this last issue, the Board cannot review the decision to appoint a conciliation officer, since this was not a decision of the Board. The Board can only take account of the fact that it has been done, and apply the provisions of the Act accordingly. On the other issues, the Board has stated in the past that it is neither improper nor unlawful for a union to seek to order its affairs so as to take advantage of the provisions of the Act relating to when termination applications can be filed: see *The T. Eaton Company Limited*, [1985] OLRB Rep. Aug. 1309 at paragraph 32. Just as the timing of a request for conciliation.
- 6. In fact, in many cases, the appointment of a conciliation officer is sought much sooner than it was here. It appears from the submissions before us that the parties had been bargaining for about a year and a half without a collective agreement, before the request for conciliation was made. During that period of time, of course, it was entirely open to the applicants to make an application for termination of bargaining rights, which would have been timely. Having made an untimely application, however, the applicants will now have to defer their request to terminate bargaining rights until the next open period provided for under the Act.
- 7. For the above reasons, the Board finds that this application is untimely, and it is hereby dismissed.

3519-95-R Ian Crockford et al, Applicant v. United Brotherhood of Carpenters and Joiners of America and its Local 1030, Responding Party v. 520601 Ontario Ltd., o/a **Ontario Truss and Wall**, Intervenor.

Charges - Employer Initiation - Intimidation and Coercion - Construction Industry - Representation Vote - Termination - In response to termination application, union seeking dismissal under subsection 63(16) of the Act and pleading material facts sufficient to establish *prima facie* case of employer initiation or employer threats and intimidation in connection with application - Board directing that representation vote be deferred until determination of allegations raised by union and listing matter for hearing

BEFORE: Jerry Kovacs, Vice-Chair, and Board Members W. N. Fraser and G. McMenemy.

DECISION OF THE BOARD; January 9, 1996

- 1. This is an application for termination of bargaining rights filed on December 29, 1995.
- 2. The title of proceedings is amended to add the following party as intervenor: "520601 Ontario Ltd. o/a Ontario Truss and Wall".

- 3. The responding party ("the union") asserts in its response that the application ought to be dismissed for various reasons including employer initiation of the application. The union has pleaded material facts supporting its assertion and the other parties have pleaded facts in denial of the allegation.
- 4. The Board has recently considered the circumstances in which it might hold a hearing prior to a representation vote in termination cases. In *Labourers' International Union of North America*, *Local 1059* (Board File No. 3349-95-R, unreported decision dated December 21, 1995), the Board said the following:

. . .

- 3. Section 63 of the Labour Relations Act, 1995 ("the Act") now governs the bringing of an application for a declaration terminating bargaining rights. Although it is evident from a review of the Act that the disposition of such an application will be determined, in the usual case, by way of a representation vote, it is clear from section 63(16) of the Act that, despite the provisions of section 63 which direct the Board to authorize a representation vote in certain circumstances, and to make a declaration in accordance with the result of that vote, the Board may hold a hearing and may dismiss the application without a vote if it is satisfied that the employer or a person acting on behalf of the employer initiated the application or engaged in threats, coercion or intimidation in connection with the application. In cases such as this one, where the union asserts material facts sufficient to establish a prima facie case of employer initiation or of employer threats, intimidation or coercion in connection with the application, the Board may schedule a hearing to deal with these allegations (as well as any other outstanding issues) prior to the holding of a representation vote.
- 5. In the matter before us, the union has pleaded material facts sufficient to establish a *prima facie* case of employer initiation or of employer threats, intimidation or coercion in connection with the application.
- 6. The Board directs that any representation vote in this proceeding be deferred until the determination of the allegations raised in the response by the union.
- 7. This matter is scheduled for hearing on Monday January 22, 1996, at the "Board Room", 6th Floor, 400 University Avenue, Toronto at 9:30 a.m. The purpose of the hearing is to hear evidence and submissions of the parties on all outstanding issues. The parties will be expected to meet with a Labour Relations Officer prior to the hearing.

2961-95-JD Labourers' International Union of North America, Local 506, Applicant v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America and **Rapid Forming Inc.**, Responding Parties

Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Carpenters' union and Labourers' union disputing assignment of certain work in connection with placement and rough assembly of column forms on parking garage construction project - Board declining to hear oral evidence on issue of employer practice desired to be called by Carpenters' union - Board confirming employer's composite crew assignment

BEFORE: Lee Shouldice, Vice-Chair, and Board Members W. N. Fraser and G. McMenemy.

APPEARANCES: John Moszynski and Armando Camara for the applicant; J. James Nyman and Jack Slaughter for the responding party, Carpenters and Allied Workers Local 27; Bruce Binning for Rapid Forming Inc., the General Contractors Section of the Toronto Construction Association, and the Concrete Forming Association of Ontario.

DECISION OF THE BOARD; January 12, 1996

- 1. This is an application respecting a jurisdictional dispute which is brought before the Board pursuant to section 99 of the *Labour Relations Act*, 1995, S.O. 1995, c.1 ("the Act"). The application was filed with the Board on November 7, 1995. The parties filed extensive briefs with the Board and a consultation was held with the parties on January 2, 1996.
- 2. Rapid Forming Inc. ("the employer") is engaged as a concrete forming contractor and is currently constructing a parking garage in Brampton, Ontario. The employer has been subcontracted the concrete forming work by Inzola Construction, the general contractor for the project. The employer is bound to both the Carpenters' Provincial I.C.I. collective agreement and the Labourers' Provincial I.C.I. collective agreement. The employer is a member of the Concrete Forming Association of Ontario.
- 3. The work in dispute is described somewhat differently by the parties but is, in essence, the placement and rough assembly of shoring frames and the placement and rough assembly of column forms on this project. The employer has assigned the work on this project to a composite crew of Labourers and Carpenters. In short, the Labourers have been cleaning and oiling the shoring frames, screwjacks and u-heads, and then moving those components as well as stringers, joists, plywood and bracing to the point of assembly or erection. At that point, members of the Labourers have been placing the screwjacks, bracings and u-heads on the shoring frames, and then have been placing stringers in the u-heads and rough tightening the nuts, bolts and washers, securing the stringers to the u-heads. The precise layout, alignment and blocking of the shoring frames is then performed by members of the Carpenters union. The Carpenters assert that its members should be assigned the work consisting of the placement of screwjacks, bracings and u-heads on the frames, and the placement of the stringers and the rough tightening of the nuts, bolts and washers referred to above.
- 4. With respect to the placement and rough assembly of column forms, the Labourers have been assigned the particular tasks of dropping into place the prefabricated rebar cage and column forms, and the rough placement of a shoring jack against the column form. The employer has assigned Carpenters to build the various templates required, and members of the Carpenters also perform the precise plumbing and straightening of the columns and the shoring jacks, as well as the

bolting of the column form. The Carpenters assert that its members should be assigned the above work which has been assigned to members of the Labourers' union.

- 5. When determining a jurisdictional dispute application, the Board takes into account a number of criteria including (but not limited to) the various collective bargaining relationships affecting the work in dispute, the skills and training required to perform the work, considerations of economy and efficiency, the employer's practice, and the area practice.
- 6. With respect to the latter criterion, the materials filed by the parties respecting the practice in Board Area 8 were somewhat unsatisfactory and at best establish only that there is no consistent area practice in the assignment of the work in dispute. As noted earlier, both the Carpenters and the Labourers have collective bargaining relationships with the employer. Both agreements can be read to claim jurisdiction over the work in dispute, although the Carpenters' Provincial Agreement appears to more clearly capture the full extent of the work in dispute.
- 7. The materials filed with the Board suggest that both members of the Labourers and members of the Carpenters have the necessary skills and training to safely perform the work in dispute.
- 8. There were no materials placed before the Board to suggest that the assignment of the work in dispute to the Carpenters on site would lead to a more economical or efficient work place. The Labourers asserted that the work as assigned was being performed in a fast and efficient manner; the Carpenters questioned the economy and efficiency of the work assignment but did not explain why the assignment as made was in any way uneconomic or inefficient in relation to an assignment which would be made to its members.
- 9. In our view, the most significant material before the Board is that of the employer's past practice. It is evident that the employer has, in Board Area 8, performed seven projects in the I.C.I. sector of the construction industry since December, 1985 (not including the project in question). The latest of the seven projects was performed in October, 1989. Of these seven projects, two were parking garages without any meaningful difference to the project in question. In each of these seven projects the employer assigned the work in dispute to a composite crew of Carpenters and Labourers. No grievance was filed by the Carpenters' relating to the work assignment on either parking garage project (or any of the other five projects), although it acknowledges a bargaining relationship with the employer since December, 1985. This criterion strongly favours assignment of the work in dispute to the Labourers as part of a composite crew.
- 10. By way of correspondence dated January 8, 1996, counsel for the Carpenters wrote to the Board "to make it clear again that in the past on prior projects, as pleaded in our brief, the Employer assigned the work in dispute to members of Local 27. If the issue of Employer practice is pivotal to the disposition of the Application then we request a full hearing with evidence tendered under oath in this regard". It is to be noted here that the Labourers' brief filed with the Board contained a list of projects upon which it was asserted that the employer had previously assigned work similar to the work in dispute to a composite crew of carpenters and labourers. In the Carpenters' initial brief, it was asserted that there was no relevant employer practice or preference, as the employer had not been engaged in formwork construction for several years. In a supplementary brief, it is asserted that on six of the projects listed (including the two parking garages) the work was "assigned in a manner consistent with the Carpenters' claim" and the Carpenters state that it is prepared to call evidence to that effect.
- 11. Since January, 1993, the Board has dealt with jurisdictional disputes by way of consultation rather than by hearing, as is permitted by section 99 of the Act. The Board's procedures

involved in the disposition of these disputes are created in such a manner as to minimize the length and cost of litigation. The Board has made it quite clear that in the typical jurisdictional dispute proceeding the application will be determined by reference to the material contained in the briefs filed with the Board (see, for example, *I.B.E.W.*, *Local 1788*, Board File 3415-95-JD, as yet unreported, December 6, 1995). There are no circumstances here suggesting that the Board ought to entertain oral evidence on the issue of employer practice. Accordingly, it is inappropriate to entertain the evidence desired to be called by the Carpenters.

12. Having considered all of the material before the Board, and the representations of the parties made at the consultation, we are not satisfied that the assignment of the work in dispute was improper and confirm the assignment made by the employer.

3901-94-JD Association of Allied Health Professionals: Ontario, Applicant v. Ontario Nurses' Association and **Sudbury & District Health Unit**, Responding Parties

Jurisdictional Dispute - AAHP:O and ONA disputing assignment of work performed in "Genetic Counselor" classification at district health unit - Provisions of relevant collective agreements and past practice of exclusive assignment of work to nurses combining to outweigh other factors - Board accordingly ordering that employer cease assigning disputed work to persons covered by AAHP:O collective agreement, and that it restore assignment to persons covered by ONA collective agreement

BEFORE: Jerry Kovacs, Vice-Chair, and Board Members W. H. Wightman and P. V. Grasso.

APPEARANCES: James Fyshe, Michele McPhee and Heather Hare for the applicant; Karen Sandercock, Greta Barazzutti, Monique Proulx and Lise Nicholls for Ontario Nurses' Association; K. R. Valin and John Cowan for Sudbury & District Health Unit.

DECISION OF THE BOARD; January 10, 1996

- This is an application under section 93 of the Labour Relations Act (as it was before Bill 7) concerning the assignment of work performed in the classification of "Genetic Counsellor". The applicant ("AAHP:O") seeks a declaration that the Sudbury & District Health Unit ("the employer") properly assigned work to the AAHP:O bargaining unit. The responding party, Ontario Nurses' Association ("ONA") seeks a direction that the work should be assigned exclusively to the ONA bargaining unit, and that the employer should cease assignment of the work to the AAHP:O. Both the AAHP:O and the employer take the position that the work in dispute should be assigned on a "composite crew" basis, i.e., where a nurse is hired the position should be assigned to the ONA unit, and where a non-nurse is hired the position should be assigned to the AAHP:O unit.
- 2. In deciding this matter, the Board has been assisted by the helpful submissions filed by the parties, as well as their able oral submissions to the Board at the consultation held pursuant to section 93 (1.1) of the *Act*.
- 3. ONA represents all registered and graduate nurses employed at the Sudbury & District

Health Unit. The scope clause of its current collective agreement with the employer includes the following provisions:

- 2.01 This Agreement shall apply to all nurses of the Employer, as defined in the Certificate of Certification issued by the Ontario Labour Relations Board, dated at Toronto the 15th day of June, 1967.
- 2.02 Notwithstanding Article 2.01, this being all registered, graduate nurses and those Case Managers who are nurses, employed by the Board of Health, Sudbury and District Health Unit, save and except Assistant Director of Nursing, persons above the rank of Assistant Director of Nursing, Director of Home Care Program and Assistant Director of Home Care Program, and Manager Home Making Services, and Assistant Manager Home Making Services.
- 2.03 (a) Employees outside the Scope of the Bargaining Unit will not perform the work normally performed by members of the Bargaining Unit except for instruction, research, during an emergency or in other cases as are mutually agreed by the parties.
- 4. The AAHP:O represents a bargaining unit of paramedical employees and its current collective agreement with the employer contains the following recognition clause:
 - 1.01 The Employer recognizes the Association as the sole and exclusive bargaining agent of all paramedical employees of the Sudbury & District Health Unit in the Regional Municipality of Sudbury and the Districts of Sudbury and Manitoulin, save and except Supervisors, persons above the rank of Supervisors, students employed during the school vacation period, and persons for whom any trade union held bargaining rights as of April 14, 1992.

The AAHP:O unit has included such paramedical classifications as physiotherapist, occupational therapist and social worker.

- The Sudbury & District Health Unit works closely with the Sudbury General Hospital. Indeed, the Health Unit's offices are found within a house owned by the hospital. The work in dispute forms part of the Sudbury Genetic Program, a joint operation of the Health Unit and the hospital. Although the parties did not dispute that it is the Health Unit that employs persons occupying positions in the classification in dispute, they spent some time in explaining to the Board that the source of funding for the Health Unit differs from the source of funding for the hospital. Although the Ministry of Health funds both entities, it is the Hospital Branch of the Ministry that funds the hospital, and the Public Health Branch of the Ministry that funds the Health Unit, i.e., the employer in this case. And although the Health Unit is the employer of the Genetic Counsellors at issue, the funding of the few positions in that classification is shared by the two entities that jointly administer the Sudbury Genetic Program. Accordingly, one full-time position is funded by the hospital Branch of the Ministry, and another full-time position is funded by the Public Health Branch. Further, there is a part-time position that is funded by the Public Health Branch as well. While the Health Unit works in conjunction with the hospital, it is obvious that the Health Unit has no right to control the resources of the hospital. Accordingly, one might speculate (as did both AAHP:O and the employer) that the hospital could withdraw its allocation of Hospital Branch funding in respect of one of the full-time genetic counsellor positions, and one might further speculate that it might do so for any reason, including the outcome of this case. We are not convinced that funding concerns, speculative and variable as they are, ought to be accorded much weight in this case.
- 6. In reviewing the applicant's submissions, ONA observed that the applicant had failed to provide a detailed description of the work in dispute. Indeed, both AAHP:O and the employer

admitted that there was no existing job description. For its part, ONA referred to a number of detailed draft job descriptions and to genetic policy and procedure manuals that nurse Genetic Counsellors had prepared at various points in the recent past. These were not official documents in the sense that the employer had never formerly approved them. During the consultation with the Board, however, the parties and their counsel made commendable efforts to reach agreements on the nature of the work in dispute.

- The employer commenced a genetic counselling service in 1976, employing one nurse on a part-time basis (one-half day per week) to work in conjunction with medical and support staff. In or about 1978, a different nurse replaced the original employee, but continued to perform the genetic counsellor duties on a part-time basis. By about 1980, two nurses were employed on a parttime basis performing genetic counsellor duties. These two nurses prepared (in 1991 or 1992) the draft policy and procedure documents referred to above. In about 1992, one of those nurses, Louise Picard, began to work on a full-time (or near full-time) schedule. Ms. Picard left the position later in 1992. Before her departure, the employer posted (on March 6, 1992) a full-time vacancy in a Genetic Counsellor position. That position was filled by a nurse, Val Allison. Later that year, in approximately September, 1992, the employer posted a further full-time vacancy in the Genetic Counsellor position. That position was filled in May of 1993 by Heather Hare, who is not a nurse. Although the employer delayed in deciding whether this was a position within the bargaining unit of either trade union, it eventually (in August of 1993) decided that the position fell within the AAHP:O bargaining unit. ONA responded by filing a grievance against the employer disputing the assignment of the Genetic Counsellor position to the AAHP:O unit. Subsequently, AAHP: O filed the instant application.
- 8. ONA provided some further details of the manner in which the Genetic Counsellor positions have been filled. One of the part-time Genetic Counsellors, Monique Proulx, took a leave of absence during 1993. During that period, a nurse filled that position temporarily while maintaining her position within the ONA bargaining unit. Further, in April of 1994, Heather Hare was absent from her position while on a maternity leave. During that period, the same nurse filled the position temporarily vacated by Ms. Hare. As in the earlier instance, that nurse continued to be covered by the ONA collective agreement while filling the temporary vacancy.
- As noted, no job description exists for the position of Genetic Counsellor. With the assistance of all parties during the consultation process, the Board learned something of the nature of the work in dispute. The parties refer to persons utilizing the services of the Sudbury Genetic Program as "clients". Clients come to the employer's clinic either upon referral by a physician or on their own initiative. The client's first substantial contact is with a Genetic Counsellor. The Genetic Counsellor meets with the client to gather information from the client and to provide information about genetic testing. Clients come for a variety of reasons including concerns related to a family history of diseases, or to recurrent spontaneous abortions, to give two examples; such concerns suggest the appropriateness of genetic testing. The Genetic Counsellor's contact with the client may include a home visit with the client's family. After these initial screening procedures, the counsellor prepares a written report in the form of a letter to a physician. That report provides a summary of information gathered and includes recommendations in respect of genetic testing. The Genetic Counsellor may speak to a geneticist (i.e. a physician) with respect to the type of testing that should occur. Because the Genetic Counsellors in the Sudbury Genetic Program work closely with physicians in the area, there is some understanding with respect to the counsellors' authority to arrange for certain standard testing. Genetic Counsellors are further involved in clinic preparation and related activities. Following the testing, if no abnormalities surface, the Genetic Counsellor will meet again with the client and the client's family to discuss the test results. If there are abnormalities present in the test results, the client is referred to the geneticist. Formal interpre-

tation of the results is done by a geneticist. Although the geneticist is formally responsible for interpreting the result of a test, the counsellor is most often responsible for explaining the results of a test to the client and the client's family. In addition to duties that are specific to a client, the counsellors are also responsible for educational and promotional activities.

- 10. Despite agreement on the general nature of the work, there remained areas of dispute. In particular, AAHP:O and the employer initially took the position that a Genetic Counsellor with specific counselling education (i.e., Heather Hare, who has a Master's degree in genetic counselling) acts as a resource person to the nurse Genetic Counsellors. After some debate, the parties each acknowledged that the nurse Genetic Counsellor and the non-nurse Genetic Counsellor each bring particular strengths to the program because of education and experience, and that each benefit from the other's assistance.
- 11. Although the position has existed since 1976, there was no evidence of a job posting prior to that posted on March 6, 1992. It appeared as follows:

MARCH 6, 1992

STAFF ADVISEMENT

Sudbury Genetic Program
Position Available
for
Genetic Counsellor

In an integrated Genetic Program jointly administered by the Sudbury General Hospital and the Sudbury & District Health Unit.

Serves a large geographical area in Northern Ontario.

Responsibilities

Working with a team to provide

- coordination of the clinical genetic services
- prenatal diagnosis counselling
- teratogen counselling
- educational and promotional activities

Qualifications:

Interested candidates must have a Masters degree in Genetic Counselling *OR* B.Sc.N. or equivalent degree with additional preparation and/or experience in genetic counselling.

Compensation based on qualifications and experience.

Current salary scale is under review.

Submit enquiries, application, curriculum vitae and references to:

Mr. John Cowan, Director Administration Department Sudbury & District Health Unit 1300 Paris Crescent Sudbury, Ontario P3E 3A3

Although all persons filling the position until that time had been registered nurses, we note that

the job posting "qualifications" provision referred to either a Masters degree in Genetic Counselling or a "B.Sc.N. or equivalent degree".

12. The next posting for a genetic counsellor position was that of June 7, 1994, which read as follows:

June 7, 1994

SUDBURY & DISTRICT HEALTH UNIT JOB POSTING ONA 94-10/AAHP 94-02

POSITION Genetic Counsellor

Temporary replacement for approximately 35 weeks

Pregnancy/Parental Leave of Absence

SALARY \$19,889 - \$26,667 hourly

LOCATION Sudbury - Genetic House

POSITION Working with a team to provide

SUMMARY - coordination of the clinical genetic services, including the maternal serum

screening program

- prenatal diagnosis counselling

- teratogen counselling

- educational and promotional activities

QUALIFI- Interested candidates must have a Masters degree in Genetic Counselling OR CATIONS equivalent degree with additional preparation and/or experience in genetic

quivalent degree with additional preparation and/or

counselling.

EXPERIENCE Preferred but not essential.

EFFECTIVE Immediately.

Applications are invited and will be received by the Coordinator, Human Resources above noted posting until June 13, 1994.

"Elsie Lindsay," Coordinator Human Resources

We note that this job posting's provisions regarding qualifications made no reference to nursing.

- 13. The Board was also referred to a posting from September of 1993, the provisions of which were identical to the first job posting reproduced above, with the exception of an additional contact person for receipt of applications. The Board was further referred to two more recent job postings which were prepared and posted after the initiation of these proceedings.
- ONA highlighted the language variations in the "qualifications" section of job postings. It is apparent that the employer no longer sought, in particular, a candidate with a nursing degree. From ONA's perspective, this signalled the employer's intention to continue to move away from the employment of nurses in the position of Genetic Counsellor with a resulting continued erosion

of the ONA bargaining unit. The first of the more recent postings was dated April 3, 1995 and reads as follows:

April 3, 1995

SUDBURY & DISTRICT HEALTH UNIT JOB POSTING ONA 95-13 AAHP 95-01

POSITION Genetic Counsellor

Part-time - 35 hours/bi-weekly

SALARY Negotiable according to qualifications

LOCATION Sudbury - Genetic House

POSITION Working with a team to provide

SUMMARY - coordination of the clinical genetic services, including the maternal serum

screening program

- prenatal diagnosis counselling

- teratogen counselling

- educational and promotional activities

QUALIFI- Interested candidates must have a Master's degree in Genetic Counselling OR a

CATIONS Bachelor's degree in a related field e.g. Nursing with additional preparation

and/or experience in genetics.

EXPERIENCE Preferred but not essential.

EFFECTIVE Immediately.

Applications are invited and will be received by the Coordinator, Human Resources for the above noted posting until April 7, 1995.

"Elsie Lindsay," Coordinator, Human Resources

The second, dated May 8, 1995, reads as follows:

May 8, 1995

SUDBURY & DISTRICT HEALTH UNIT JOB ADVISEMENT

POSITION GENETIC COUNSELLOR

Part-time - 35 hours/bi-weekly with possibility of moving to full-time within the

Sudbury and District Health Unit (not only genetics)

SALARY Under review

LOCATION Sudbury - Genetic House

POSITION Working with a team to provide

SUMMARY - coordination of the clinical genetic services, including the maternal serum

screening program

- prenatal diagnosis counselling

- teratogen counselling

- educational and promotional activities

QUALIFI-CATIONS

Interested candidates must have a Master's degree in Genetic Counselling OR a Bachelor's degree in a related field e.g. Nursing with additional preparation and/or experience in genetics.

EXPERIENCE Preferred but not essential.

EFFECTIVE Immediately.

Submit enquiries, application, curriculum vitae and references to:

Mr. John Cowan Administration Department Sudbury & District Health Unit 1300 Paris Street Sudbury, Ontario P3E 3A3

- Nurses have filled the position of Genetic Counsellor at all times until the employment of Heather Hare, who has a Master's degree in Genetic Counselling. From the perspective of the employer and AAHP:O, the field of genetic counselling has evolved since 1976 when the employer began its genetic counselling program. In particular, there have been developments in post-secondary education in this field. New university programs such as a Master's degree in Genetic Counselling now provide for more specific education in the field. There now exists a Canadian Association of Genetic Counsellors, which counts persons of varying educational backgrounds among its members. More than half of its members are not nurses. The employer's goal is to have a multi-disciplinary group of employees filling the available positions in the classification of Genetic Counsellor. In particular, it prefers to have persons with genetic counselling education as well as persons with nursing education. It believes that each brings different qualifications to the program and that the program functions best when Genetic Counsellors with differing qualifications can share their differing expertise.
- Although the parties dispute the degree to which a nurse Genetic Counsellor might seek the particular expertise of a genetic counsellor with a Master's degree in genetic counselling (i.e., Heather Hare), their counsel suggested that the situation was analogous to that of a group of lawyers practising in the same field and working together as partners. Lawyers will speak to each other about particular areas of expertise and will benefit from those discussions. ONA accepted that this may be the true workplace dynamic, but argued that it had nothing to do with characterizing the nature of the work in dispute. It further argued that the training factor was not critical in the instant case. It acknowledged that Heather Hare or a person with a Master's degree in genetic counselling was competent to perform the work. However, it argued that this was not a determinative factor in a case where the employer had invariably employed nurses to perform the work throughout the history of the program, and where the ONA collective agreement guaranteed that work normally performed by its members should continue to be performed by its members.
- 17. In assessing the merits of jurisdictional disputes, the Board typically considers a number of criteria, including the following:
 - (a) Collective bargaining relations;
 - (b) Skill and training;
 - (c) Safety;
 - (d) Economy and efficiency;

- (e) Employer past practice;
- (f) Area or industry practice;
- (g) Employer preference.

The Board developed that approach in cases involving, for the most part, construction trade unions. Indeed, construction industry cases comprise the bulk of proceedings under section 93 of the *Act*. Not surprisingly, the Board has commented that an approach fashioned to address the largely unique circumstances of construction industry disputes is of rather limited assistance in nonconstruction disputes.

- 18. Indeed, the trade union parties to this proceeding are not strangers to the Board's jurisprudence in this regard. In particular, three recent decisions of the Board have involved one or both of these trade unions in disputes regarding the position of "Health Promoter" at different health units in the province, and the parties referred to these decisions at some length.
- 19. In the first case, (*Eastern Ontario Health Unit*, Board File Nos. 2030-91-JD and 2164-91-JD, an unreported decision dated April 30, 1993) ONA, AAHP:O and the CUPE, Local 1997, each took the position that the newly created position of Health Promoter fell within its respective bargaining unit. In that case (as well as in the subsequent two cases considered by the Board), the employer created the position of Health Promoter in response to the "Mandatory Health Programs and Services Guidelines" published by the Ministry of Health and with which the employer was required to comply. The key impact of those guidelines was to mandate the "utilization of interdisciplinary teams to gain health program excellence". The Board noted that the position in dispute, that of Health Promoter", was created in direct response to the Ministry's guidelines. As ONA pointed out, much of the work performed by the Health Promoters was similar to the health education and promotion work previously performed by Public Health Nurses employed within the nurses bargaining unit. However, the employer filled the Health Promoter positions with persons from a variety of backgrounds including nurses and persons with different Bachelor's or Master's degrees in areas such as physical and health education.
- 20. After reviewing the above-noted traditional criteria, the Board noted that the factors of employer past practice and area past practice were of limited assistance because the positions were of such recent origin. The Board also decided that it would not give much weight to employer preference because the employer had refused to assign the position to either of the three units.
- 21. The Board concluded that a "composite crew" approach was appropriate in the circumstances and found that the Health Promoter positions should be apportioned among the three bargaining units. The Board stated:

. . .

28. The nature of the work performed by Health Educator/Promoters who are registered nurses, and the skills and knowledge which they utilize in performing it, lend substantial support to O.N.A.'s claim that persons in that classification who are registered nurses should be included in its bargaining unit. However, there is some variance in the duties and responsibilities of employees in that classification, and the Employer has a legitimate need to be in a position to adopt an interdisciplinary approach by utilizing Health Educator/Promoters with various types of training, knowledge, and experience in areas such as nutrition, recreology, and other aspects of health education and promotion. These factors render untenable O.N.A.'s contention that all of the Health Educator/Promoter positions should be awarded to registered nurses and included in its bargaining unit. For reasons which are largely historical in nature, the Board has granted O.N.A. bargaining units confined to registered and graduate nurses. That very narrow unit is

undoubtedly advantageous to O.N.A. in a number of respects. However, it does not enable O.N.A. to dictate that, despite ongoing developments in the public health field as described above, the Employer must use only registered nurses to perform health education and promotion work, even though persons with other educational or experiential backgrounds are equally or better qualified to perform various aspects of that work, and are essential to the interdisciplinary approach emphasized in the aforementioned Guidelines and standards. (See, generally, Sudbury Algoma Hospital, [1989] OLRB Rep. Apr. 390.) On the other hand, an employer such as the Health Unit whose work place is split into a number of discrete bargaining units cannot legitimately proceed as if those bargaining units do not exist by creating a broad classification covering some positions that should properly be included in one bargaining unit and other positions which should properly be included in a second (or third) bargaining unit. Although (in the absence of circumstances rendering it an unfair labour practice) the Health Unit is at liberty to select either a registered nurse or other duly qualified person to fill a Health Educator/Promoter position, if it elects to use a registered nurse that position must be included in O.N.A.'s bargaining unit, because registered nurses functioning as Health Educator/Promoters rely upon the knowledge and skills obtained through their nursing education and experience to fulfill the duties and responsibilities of those positions.

In the second related decision (*Peterborough County-City Health Unit*, Board File No. 3433-92-JD, unreported decision dated March 25, 1994) [now reported at [1994] OLRB Rep. Mar. 292] the dispute was between AAHP:O and ONA. Again, the employer had recently created the position of Health Promoter. In the litigation of that matter, the employer eventually took the position that the Board should apply an approach similar to that adopted in the Eastern Ontario Health Unit case by directing that if the employer elected to a nurse to fill a health promoted position, the position must be included in the ONA bargaining unit. That approach would require the position to be included in the AAHP:O bargaining unit if the employer chose to use someone who was not a nurse to fill the Health Promoter position. The Board again found an employer that had created the Health Promoter position in response to the mandatory guidelines of the Ministry that required an "inter- disciplinary approach". As the Board said in paragraph 17:

"... there remains a legitimate need for the Employer to be able in filling those positions to consider not only nurses, but also other individuals ... whose educational and experiential backgrounds qualify them to perform health promotion work, and who are essential to the interdisciplinary approach emphasized in the aforementioned Ministry of Health Mandatory Health Programs and Services Guidelines, and the related standards. However, we are also satisfied that, as in the Eastern Ontario Health Unit case, where the Employer elects to use a nurse to fill a Health Promoter position, that position should be included in ONA's bargaining unit in order to prevent an unwarranted erosion of that bargaining unit. Our determination in this regard reflects that fact that nurses employed as Health Promoters rely upon the knowledge and skills obtained through their nursing education and experience to fulfill the duties and responsibilities of those positions. It also reflects our view that, as contended by the Employer, it would be anomalous and unconducive to sound labour relations to have such nurses included in another bargaining unit, such as the one represented by AAHPO, in the circumstances of this case".

23. In the third related case, (Frontenac and Lennox and Addington Health Unit, Board File No. 3729-94-JD, unreported decision dated May 23, 1995) [now reported at [1995] OLRB Rep. May 587] AAHP:O and CUPE disputed the employer's assignment of the Health Promoter position. As in the prior decisions, the Board decided that the criteria often found to be of considerable assistance in the context of jurisdictional disputes arising in the construction industry were of rather limited assistance in disputes in the health industry. Again, the Board found that employer past practice and area past practice were of relatively little assistance. However, the Board found that the criteria of collective bargaining relationships and employer preference were of assistance in deciding the case. In discussing the "composite crew" approach that it had taken in the early Health Promoter cases, the Board explained that it had been

... "attempting to protect ONA's "craft unit" bargaining rights from being unduly eroded while simultaneously accommodating the health unit's legitimate need to employ in health promotion

positions not only nurses but also other individuals whose educational and experiential backgrounds qualify them to perform health promotion work, and whose involvement in such positions was essential to inter-disciplinary approach emphasized in the aforementioned [guidelines]".

- ONA was not involved in this third case, and so the Board did not need to address the complicating factor of ONA "craft unit" bargaining rights for health unit's nurses. The employer's nurses were included in the CUPE "all- employee" bargaining unit. In all of the circumstances, the Board found that it was most appropriate to maintain the Health Promoter positions within a single bargaining unit and that this would serve to facilitate the inter-disciplinary approach required of the employer. In other words, the Board found these circumstances distinguishable from the earlier two cases involving Health Promoters. It also noted that, unlike the employers in the other cases, the employer had consistently expressed a strong preference to have the Health Promoter classification included in the CUPE unit, based on valid labour relations considerations (e.g., the composite crew approach might raise problems regarding seniority— related issues such as promotions, layoff and recalls).
- Although all parties referred to this trilogy of health unit cases, we do not find that any of them are determinative of the matter before us. In the case before us, we are not presented with a newly created position. The Sudbury & District Health Unit has a long history of employing nurses in the position of Genetic Counsellor. Further, the position was not created in response to, nor were its duties tailored to comply with, any particular mandatory Ministry guidelines. That said, we nonetheless find that the employer in the instant matter seeks, of its own accord, to live by the spirit of the "inter-disciplinary approach" to health care that was described at eloquent length in the earlier decisions related to the Health Promoter position. But the Genetic Counsellor position was not created as part of a plan to introduce multi-disciplinary health care. In this case, the employer has reassigned a long-established position in order to introduce a new professional discipline into its health care program.
- 26. From ONA's perspective the instant case turns on two of the traditional criteria applied to determine jurisdictional disputes: (i) ONA's long-standing collective bargaining relationship with the employer (and in particular, the collective agreement provisions protecting work "normally performed" by nurses) and, (ii) the employer's long-standing consistent past practice of employing only nurses as genetic counsellors.
- 27. As counsel for ONA noted, the Board considered provisions similar to article 2.03 of its collective agreement in *Pioneer Manor Home for the Aged*, [1993] OLRB Rep. May 447, where the Board reviewed arbitral jurisprudence related to similar language in a number of ONA collective agreements. In general, such provisions refer to ONA's entitlement to "work normally performed" by members of its bargaining unit.
- 28. In *Pioneer Manor*, the Board concluded that the language and the jurisprudence interpreting similar language provided forceful support for the nurses' claim in the circumstances of the particular work in dispute. In *Pioneer Manor*, the work in dispute consisted of the administration of various medications to the residents of the *Home for the Aged*. For more than twenty years the function of administering medications was performed by practical nurses (i.e., persons who were not registered nurses or graduate nurses represented by ONA). Subsequently, Ministry guidelines required that drugs be administered only by a physician or a registered nurse or, with approval, by a registered nursing assistant. After the issuance of those guidelines, the employer re-assigned administration of medications exclusively to registered nurses. That practice remained in effect for more than fifteen years, when the employer decided to reassign the administration of most medications to registered nursing assistants, (i.e., persons who cannot form part of ONA bargaining

units). Clearly, it was the employer's intention to continue to reduce its use of registered nurses and thereby reduce its labour costs.

- 29. As in this case, the Board in *Pioneer Manor* had occasion to consider the apparently voluminous arbitral jurisprudence regarding 'job protection' clauses such as the one found in the ONA agreement with the Sudbury & District Health Unit (and counsel for ONA referred us to various other arbitral awards to the same effect). As in *Pioneer Manor*, it would be difficult for the Board in this case to conclude that the employer in the matter before us has not violated the 'job protection' provision of the ONA collective agreement. The work of genetic counselling has been performed exclusively by nurses for many years. The obvious intent of Article 2.03 (a) of the ONA collective agreement is to protect the scope of its bargaining unit by ensuring that work normally performed by nurses will continue to be performed exclusively by them. In other words, ONA has negotiated a provision requiring the employer to assign the work in dispute to it. As for AAHP:O, it never asserted any claim to the work during the years before the employer chose to hire a nonnurse and to assign her to the AAHP:O unit.
- 30. With regard to the nature of the work in dispute, we find some suggestion that Heather Hare's work differs slightly from that of nurse Genetic Counsellors. To the extent that the work includes discussions between co-workers and the sharing of experience and ideas in assessing clients' cases and in developing the Genetic Program, a person with a Master's degree in Genetic Counselling brings special expertise and perhaps a unique contribution to the work. Nonetheless, the bulk of work performed by nurse or non-nurse is the same. Indeed, the employer does not take the position that the position filled by Heather Hare is new or different from the Genetic Counsellor positions that nurses fill. Accordingly, we find that the work now performed by Heather Hare is "work normally performed by nurses".
- 31. We are compelled to conclude that an assessment of collective bargaining relationships and past practice ultimately support ONA's greater claim to the work in dispute.
- 32. However, we must comment that other factors strongly support the reasonableness of the employer's assignment of the work. The employer wishes to offer a multi-disciplinary approach in the provisions of genetic counselling services. It is attempting to keep its program in step with developments in education and in the scope of services provided by the genetic counsellor. The development of specific education in the field makes it reasonable for the employer to reassess the skills and training that it expects of employees performing this evolving work. In addition, the employer has demonstrated a genuine preference for multi-disciplinary staffing that is not driven by a desire to phase out employment of nurses as Genetic Counsellors. Thus, the factors of employer preference and of employee skill and training support the assignment of the work in dispute to a non-nurse.
- 33. Despite the entirely sensible attempt by the employer to improve the design of its health care program, neither the employer nor the Board can ignore the distinctive obligation borne by the employer under the ONA collective agreement. Although the AAHP:O has some claim to the disputed work, it arises only because of the employer's recent assignment of a non-nurse to its bargaining unit. In contrast, ONA bargained for significant protection of the work its members normally perform. And in this case, no one other than nurses performed the work from the time the position was created in 1976 until the recent disputed assignment. This is not a case where the competing trade unions rely on equal collective agreement rights to the work in dispute, as is typical in construction industry cases. Here, ONA bargained for protection from jurisdictional disputes and the AAHP:O did not.
- 34. Although we conclude that the factors of collective bargaining relationships and past

practice are determinative of this dispute, we do not mean to suggest that the Board's approach to jurisdictional disputes in the health care sector should mirror the approach taken in construction industry cases. In this case, for instance, a variety of factors distinguish the dispute from those occurring in the construction industry. Those factors include the complexities of funding arrangements, the constant develop- ments and alterations of services offered, the availability of more specialized education, and an apparent general trend to a multi-disciplinary approach in the provision of health care. More generally, the health care sector differs significantly from the construction industry because of the prevalence of mandatory interest arbitration. Although the factor of collective bargaining weighs heavily in the instant case where one trade union has bargained for protection from jurisdictional disputes and the other has not, it may not be the prevailing factor in every health care sector dispute.

35. For these reasons, we find that the provisions of the relevant collective agreements and the past practice of exclusive assignment of the work to nurses combine to outweigh other factors in this case. Accordingly, the Board orders that the employer cease assigning the work in dispute to persons covered by the AAHP:O collective agreement, and that it restore forthwith the assignment of the work in dispute to persons covered by the ONA collective agreement.

CONCURRING OPINION OF BOARD MEMBER W. H. Wightman; January 10, 1996

- 1. Paragraphs 23 and 34 of the main decision allude to the limited value in attempting to resolve disputes in areas of activity other than construction by attempting to apply criteria used by the Board to resolve jurisdictional disputes in the construction sector.
- 2. Constant changes in material, equipment and methodology result in constant debate over lines of demarcation. Given the manner in which pensions and other benefits are financed for craft members there can be little wonder at the frequency of jurisdictional disputes as each craft union sees no alternative but to attempt to protect its turf even though these turf wars are waged at great expense to the parties involved and, ultimately, the public.
- 3. Disputes as to "who owns the work" between various groups involved in providing health care strike me as unseemly and inconsistent with any notion of giving primacy to the interests and needs of those receiving the care.
- 4. Thus in the health care field I believe jurisdictional disputes should be resolved on the basis of employer preference unless a more cost effective alternative of assigning the work can be demonstrated.

3283-95-U Tisdelle Enterprises Limited c.o.b. as Tim Horton's, Applicant v. United Steelworkers of America and John Henson, Responding Parties

Settlement - Unfair Labour Practice - Union moving to have employer's application under subsection 96(7) of the Act dismissed for failure to make out *prima facie* case - Employer seeking to enforce representations under subsection 96(7) not reflected in minutes of settlement - Subsection 96(7) not designed to enforce oral representations - Application dismissed

BEFORE: Ken Petryshen, Vice-Chair, and Board Members R. W. Pirrie and K. S. Brennan.

APPEARANCES: W. J. McNaughton and A. Tarasuk for the applicant; Paula Turtle and John Henson for the responding parties.

DECISION OF VICE-CHAIR, KEN PETRYSHEN AND BOARD MEMBER K. S. BRENNAN; January 19, 1996

- 1. This is an application under section 96 of the *Labour Relations Act* in which Tisdelle Enterprises Limited c.o.b. as Tim Horton's ("Tisdelle") alleges that the United Steelworkers of America and John Henson ("the Steelworkers") contravened section 96(7) of the Act.
- 2. Section 96(7) provides as follows:
 - 96.-(7) Where a proceeding under this Act has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers' organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1).
- 3. In its Response and at the hearing on January 8, 1996, the Steelworkers took the position that the application on its face and the representations made at the hearing by counsel for Tisdelle do not disclose an arguable case of a violation of section 96(7) of the Act. In entertaining this motion by the Steelworkers, the Board assumed that the facts relied upon by Tisdelle in support of its application were true.
- 4. In a section 91 application dated October 26, 1995, the Steelworkers alleged that Tisdelle had contravened what were then sections 65 and 67 of the Act when it suspended and later terminated the employment of John Carvell. The Steelworkers had filed an application for certification for a bargaining unit of Tisdelle's employees on or about April 25, 1995. Carvell was a union supporter. In its Response to the October section 91 application, Tisdelle disputed the allegations made by the Steelworkers.
- 5. The parties entered into settlement discussions. The first phase of settlement discussions involved Mr. R. Healey and Mr. Henson for the Steelworkers, and Mr. A. Tarasuk for Tisdelle. The one issue which stood in the way of a settlement was Tisdelle's request for a provision that it did not contravene the *Labour Relations Act*. The Labour Relations Officer advised Tisdelle that the Steelworkers' response to its request was that it did not need such a provision. When the application came on for hearing, Mr. M. Wright was retained to act for the Steelworkers and the second phase of settlement discussions took place between Mr. Wright and Mr. Tarasuk. In the presence of Mr. Tarasuk and Mr. Tisdelle, Mr. Wright resisted a no-violation provision and said

that Tisdelle "had nothing to worry about", that "this will not come up again" and that "this will be the end of it". Mr. Tisdelle then instructed Mr. Tarasuk not to insist on a no-violation clause. The parties agreed that the Steelworkers and Carvell shall not rely on the facts set out in the Minutes of Settlement in any other proceeding whatsoever.

6. The terms of the Minutes of Settlement executed by the parties on November 9, 1995, absent Appendix "A", are as follows:

MINUTES OF SETTLEMENT

WHEREAS John Carvell ("Carvell") was terminated by the Employer effective October 13, 1995;

AND WHEREAS the Union filed the above-captioned Application on Carvell's behalf on October 26, 1995;

AND WHEREAS the parties are desirous of settling the dispute between them;

NOW, THEREFORE, it is agreed as follows:

- 1. Carvell will be deemed to have resigned his employment with the Employer effective October 13, 1995, and all records of his employment shall be amended to reflect that he so resigned from his employment;
- 2. The Employer agrees to provide forthwith a letter of reference to Carvell, on letter-head or in a style normally used by the Employer in business correspondence, a letter as set out in Appendix "A" attached hereto. The Employer also agrees that it will restrict its comments on Carvell's employment to the matters set out in Appendix "A", and specifically shall not advise any prospective employers of Carvell, about the facts giving rise to this complainant [sic] but shall mention only that Carvell resigned for personal reasons.
- 3. The Employer agrees to pay forthwith to Carvell an amount, less such statutory deductions as are required by law, equivalent to seven (7) weeks of work at Carvell's regular rate of pay, based upon a five (5) day work week;
- 4. An equivalent amount to the amount paid to Carvell pursuant to paragraph 3 above shall also be paid by the Employer to the following individuals: Jo-Ann Bakewell and Mandy Kicks.
- 5. The above-captioned Application shall be withdrawn by the Union, and the Union, its agents, assigns or successors and Carvell agree that they shall not rely upon any of the facts set out herein in any other proceeding whatsoever, including but not limited to any other proceeding before the Ontario Labour Relations Board.
- The parties and Carvell agree that these Minutes constitute a full and final settlement
 of all matters in issue, including all statutory obligations the Employer may have otherwise owed Carvell.

Dated at Toronto this 9th day of November, 1995.

"John Henson" "Paul Tisdelle"
For the Union For the Employer
"John Carvell"
For Carvell

7. By decision dated November 9, 1995, a panel of the Board confirmed the withdrawal of the section 91 application. On or about November 9, 1995, Mr. Henson distributed the following Memorandum to the employees of Tisdelle:

TO: Employees of Tim Horton's Donuts (London)

FROM: John Henson

DATE: November 9, 1995

RE: Termination of John Carvell

As you probably know, John Carvell was fired by your employer effective October 13, 1995.

As you also probably know, John was one of the key organizers of the Union in your workplace.

I am writing to let you know the facts leading up to John's termination and afterwards.

In late September, John learned that management was investigating complaints of sexual harassment against him. John gave both management and Joanne Bakewell written apologies for comments John had made to Joanne. In the apologies, John said that he had intended the comments as a joke but was very sorry now, that he understood that the comments were not at all funny and that the comments had caused hurt to a co-worker.

Shortly after John made his apologies, he was fired.

The Union is strongly and actively opposed to sexual harassment and to all other forms of discrimination in the workplace. The United Steelworkers of America has a well-established policy against sexual harassment. We condemn sexual harassment in the workplace and will take action to prevent it, even if the harasser is an inside organizer.

In this case, the Union was not surprised that management disciplined John for his conduct. However, the Union was also concerned that management treated John more harshly than he would have been treated if he had not been an organizer for the Union. It is against the law in Ontario for an employer to punish any employee for Union activity.

The Union therefore filed a complaint to the Ontario Labour Relations Board. The hearing was to commence today. However, instead of proceeding with the hearing, the Union entered into an agreement with the Employer. As result of the agreement, John will not be returning to work. John will receive a modest amount of termination pay. Two employees who made complaints regarding John's conduct will receive monies equal to what John is receiving.

No one is happy that this happened. The Union will continue to work against all forms of sexual discrimination including sexual harassment.

We continue to await the decision of the Ontario Labour Relations Board on whether the Union will be certified to represent you. I will be in touch with you shortly so that we can arrange a unit meeting.

In the meantime, please do not hesitate to contact me with any questions or concerns you may have.

In solidarity, John Henson Organizer Retail, Wholesale Canada Division of U.S.W.A.

8. Counsel for Tisdelle argued that the Steelworkers were effectively estopped from making the statements it did in the November 9, 1995 Memorandum, or any statements about the Carvell matter, since Mr. Wright asserted during the settlement discussions that the Carvell matter would not come up again and that this will be the end of it. Counsel argued that Tisdelle relied on Mr. Wright's representations to its detriment. Counsel indicated that Tisdelle was not asking the Board to alter or rewrite the Minutes of Settlement, but rather it was asking the Board to take the

appropriate steps to enforce the estoppel created by the Steelworkers' conduct. It was suggested that a posting in the workplace which stated that the parties decided not to litigate the section 91 application involving Carvell and that the Board made no finding that Tisdelle contravened the Act would remedy the Steelworkers' conduct.

- 9. Counsel for Tisdelle also suggested that the Steelworkers violated Article 5 of the Memorandum of Settlement when it issued the Memorandum to employees that referred to the Carvell matter. Since the certification proceeding is still before the Board, counsel argued that the Memorandum to employees runs counter to the Steelworkers' agreement not to rely on any of the facts set out in the Minutes of Settlement in any proceeding.
- 10. Having considered the representations of the parties, the Board is satisfied that this application must be dismissed. The majority has reached this conclusion for the following reasons.
- Subsection 96(7) of the Act is a provision which, in effect, gives the Board the authority to enforce settlements. The language of the subsection makes it clear however, that the provision is limited to settlements in which the terms have been put in writing and signed by the parties. And it is only a complaint by a party to the settlement that another party to the settlement has not complied with the terms of the settlement that gives rise to a deemed complaint under section 96(1). We have considerable doubt that the words used by Mr. Wright during the settlement discussions could be used in the circumstances to support an estoppel. However, we need not decide this issue. Whatever legal analysis one wishes to apply to Mr. Wright's comments does not alter the fact that Tisdelle is attempting to seek enforcement of representations by means of section 96(7) which are outside of and not in any way reflected in the terms of the Minutes of Settlement. Subsection 96(7) is not designed to enforce oral representations. Parties who want to rely on section 96(7) to enforce a settlement must ensure that what they want to enforce is contained in the written terms of the settlement. We find it unnecessary to explore the sound labour relations rationale for such an approach.
- 12. Support for the above analysis can be found in Guillaume Kibale v. The Association Part-time Professors of the University of Ottawa v. University of Ottawa, (dated October 10, 1995, unreported, Board File No. 4302-94-U). The applicant in this case relied on section 96(7) and asserted that the union and the university failed to comply with the terms of a settlement. The applicant relied upon certain verbal assurances. At paragraph 13, the Board made the following comments:
 - 13. ... He [the applicant] was, however, unable to point to any specific provision of the agreement which has been violated. Rather, he argues that the settlement means, at least implicitly, that he was, notwithstanding the elaborate provisions of the collective agreement which regulate hiring and assignment of courses, guaranteed a teaching position upon the termination of his suspension. He asserted that verbal assurances to that effect had been made. While that evidence might be relevant to the section 69 aspect of Prof. Kibale's application (and, indeed, ultimately some of that evidence was heard), I dismissed the application insofar as it pertains to section 91(7) because that section relates to settlements that have been put in writing and signed by the parties or their agents. Since there was no term of the settlement which could, even remotely, be interpreted on its face to constitute a guarantee of future teaching, I was persuaded that there was no arguable case of a violation of section 91(7).
- The Board is satisfied that paragraph 5 of the Minutes of Settlement did not preclude the Steelworkers from issuing to employees the Memorandum dated November 9, 1995. Paragraph 5 is a provision commonly found in settlements of this type. By agreeing to such a provision, the Steelworkers agreed not to rely on any of the facts set out in the application in any proceeding before the Board or in any other legal proceeding. This provision would prevent the Steelworkers

from relying on those facts in the certification proceeding before the Board. It does not, however, prevent the Steelworkers from communicating with Tisdelle employees about the Carvell matter as it did in the Memorandum.

14. In order to succeed with this application, Tisdelle must establish that the Steelworkers violated the terms of the Minutes of Settlement when it issued the Memorandum dated November 9, 1995. The Board is satisfied that Tisdelle has not made out an arguable case for a violation of section 96(7). Accordingly, this application is dismissed.

DECISION OF BOARD MEMBER R. W. PIRRIE; January 19, 1996

- 1. While I have every respect for the sanctity of settlements, based on the issues in the original dispute, the content of the Minutes of Settlement document and the content of the subsequent union communication to the employees of Tim Horton's Donuts (London), it is my view that a *prima facie* case does exist and that the union violated section 96(7).
- 2. In addition I do not accept the union's proposition advanced in its preliminary motion that to hear the employer's estoppel argument would undermine the settlement process in general or violate the Board's policy of not looking behind settlements. The employer is not asking to have the terms of the settlement altered, it merely wants the settlement it agreed to honoured by the union.
- 3. In my view the basic components of estoppel exist as set out in Brown and Beatty:
 - 1) There was a representation by words intended to be relied on by the party to which it was directed.

Union counsel's comments to the employer concerning the finality of the settlement, e.g. "This will be the end of it.", etc.

2) Reliance in the form of an action or motion.

The employer's action of signing the Minutes of Settlement without the provision that Tisdelle had not violated the *Labour Relations Act*.

3) A detriment resulting therefrom.

Through the union's innuendo Tisdelle may, in the eyes of its employees, be thought to have violated the Act.

Further, as a result of the union's memorandum this very difficult issue of sexual harassment remains front and centre in the workplace when, for all intents and purposes, it should be behind the parties.

4. In the circumstances of this case, I would have dismissed the union's preliminary objection and heard the employer's application on its merits.

2714-95-G Labourers' International Union of North America, Local 1081, Applicant v. **Traugott Construction (Kitchener) Limited,** Responding Party

Construction Industry - Construction Industry Grievance - Sector Determination - Employer disputing jurisdiction of Board to determine union's grievance on basis that work in question falling within sewer and watermain sector and road sector, and not I.C.I. sector of construction industry - Employer asking Board to make sector determination under section 166 of the Act - Board applying London Sandblasting case and ruling that employer bargaining agency having authority to negotiate clause in Provincial Agreement providing that that agreement applying in all other sectors where certain conditions met - Board concluding that it has jurisdiction to arbitrate issues raised by grievance - Board also concluding that terms of Provincial Agreement precluding need for sector determination

BEFORE: Lee Shouldice, Vice-Chair, and Board Members S. C. Laing and G. McMenemy.

APPEARANCES: S.B.D. Wahl for the applicant; Ian S. Campbell for the responding party.

DECISION OF THE BOARD; January 12, 1996

I. Introduction

- 1. The name of the responding party is amended to read "Traugott Construction (Kitchener) Limited".
- This proceeding consists of two grievances in the construction industry which have been referred to the Board for arbitration pursuant to what is now section 133 of the *Labour Relations Act*, 1995 (hereinafter referred to as "the Act"). Labourers' International Union of North America, Local 1081 (hereinafter "Local 1081") complains that Traugott Construction (Kitchener) Limited (hereinafter "Traugott") has assigned work on two particular projects to companies which are not in contractual relations with Local 1081, contrary to the terms of the Labourers' Provincial I.C.I. Agreement (hereinafter "the Provincial Agreement"). Local 1081 further asserts that after the grievances were lodged with Traugott, a settlement was reached between it and Traugott, which settlement has not been satisfied by Traugott. Accordingly, Local 1081 requests that the Board issue a declaration to the effect that Traugott is both bound by the settlement and that it has violated same.
- 3. Traugott, in its response to the grievance referral, disputes the jurisdiction of the Board to arbitrate the issues raised by Local 1081, on the basis that the work in question does not fall within the I.C.I. sector of the construction industry, but rather is work falling within the sewers and watermains sector and the roads sector of the construction industry for which Local 1081 does not have bargaining rights with Traugott. Accordingly, Traugott has requested that the Board make a sector determination pursuant to what is now section 166 of the Act. Additionally, Traugott disputes that the grievances were settled as alleged by Local 1081.
- 4. Counsel for Local 1081, in his opening remarks, asserted that it was not necessary for the Board to direct the parties to apply for a sector determination, on the basis of the Board's jurisprudence and the wording of the Provincial Agreement. Counsel for the parties indicated to the Board that they desired the Board to entertain argument on that issue, render a written decision, and then direct the parties to proceed as appropriate. Accordingly the parties proceeded to argue the issue of the necessity of directing a sector determination in the circumstances.

II. Facts

- 5. For the purposes of arguing this discrete preliminary matter, there was no dispute as to the facts. Traugott is the general contractor with respect to the two projects in question, one in Kitchener, Ontario (at Gateway Park Drive and Sportsworld) and a second project in Cambridge, Ontario (at Saginaw Parkway and Franklin Boulevard). The work at issue is characterized by Traugott as the installation of sewers, watermains and catchbasins, the construction of a parking lot and perimeter curbing. Traugott has subcontracted the work in question to Drexler Construction Limited, Cambridge Curbs and Sidewalks Limited, and the Murray Group, none of which are in contractual relations with Local 1081.
- 6. Traugott acknowledges that it is bound by the Provincial Agreement. Traugott is a member of the Grand Valley Construction Association, which is, in turn, an affiliate of the Ontario General Contractors Association is a constituent member of the Labourers' employer bargaining agency, and was so designated by the Minister of Labour on or about April 21, 1978. Furthermore, it is not disputed that the Grand Valley Construction Association negotiates the Local Union Schedule to the Provincial Agreement which applies to Local 1081.
- Counsel for Local 1081 took the Board through the history of his client's bargaining rights with Traugott. A predecessor company to Traugott was a signatory to an agreement with Local 1081 dated August 6, 1970, in which the predecessor company recognized Local 1081 as the exclusive bargaining agent for "all labourers" employed by the company in a specified geographic area consisting of Waterloo, Wellington, Dufferin, Grey, Norfolk and Brant. This agreement is stated to be effective until April 30, 1973. A subsequent agreement to similar effect was entered into on May 8, 1973, and was effective until April 30, 1975, as was one dated May 1, 1977, effective until April 30, 1978. On March 11, 1974, the Board issued a certificate accrediting the Kitchener-Waterloo Construction Association (the predecessor to the Grand Valley Construction Association) as the bargaining agent for all employers for whom Local 1081 has bargaining rights in the counties of Waterloo, Wellington, Dufferin, Grey, Brant and Norfolk, in the I.C.I. sector of the construction industry. There is no dispute that Traugott's predecessor was bound by that accreditation order.

III. Relevant Statutory Provisions and Provincial Agreement References

8. During argument, counsel made reference to the following provisions of the Provincial Agreement:

ARTICLE 1 - RECOGNITION

1.01 The E.B.A. recognizes the Union as the sole and exclusive bargaining agent for all construction labourers, including masons' or bricklayers' tenders, plasterers and plasterers' apprentices and all employees engaged in cement finishing, waterproofing or restoration work and all other construction employees engaged in the industrial, commercial and institutional sector of the construction industry in the province of Ontario, for whom the Union has bargaining rights.

1.02 The Union recognizes the E.B.A. (the several parties are listed on Schedule "C") as the sole and exclusive bargaining agent for all Employers whose employees are represented by the Union and for whom the Union has bargaining rights who are engaged in the industrial, commercial, and institutional sector of the construction industry in the Province of Ontario.

. . .

1.04 This agreement shall also apply to an Employer in all other sectors where the Union or any

of its affiliated bargaining agents have bargaining rights in such other sectors for the employees of such Employer, provided that such Employer may become signatory to the various Collective Agreements applicable in such other sectors.

ARTICLE 2 - UNION SECURITY, WORK JURISDICTION, ASSIGNMENT OF WORK, SUBCONTRACTING

. . .

- 2.05 The Employer agrees to engage only subcontractors who are in contractual relations with the Union and/or its affiliated bargaining agents for all work covered by this Agreement, or work forming part of an I.C.I. General Contract except as provided in Schedule "D" hereof.
- 2.06 (a) Schedule "E" to this Collective Agreement constitutes a list of work that is claimed by the Union.
- (b) Where work within Schedule "E" is claimed by the Union and is within the I.C.I. Sector and there is no work claim dispute within the meaning of Article 8.01 the work will be assigned to employees represented by the Union.
- (c) In the event an Employer is found to have violated the provisions of 2.06(b) above the Employer shall re-assign such work to employees represented by the Union and no claim for damages will be made.

• • •

SCHEDULE "D"

The following are exceptions to Article 2.05 the Master Agreement:

1) The Employer agrees to engage only subcontractors who are in contractual relations with the Union and/or its affiliated bargaining agents or an AFL-CIO Affiliated Union for waterproofing and cement finishing work.

as well as the following provisions of the Act:

151.-(1) In this section and in sections 144 and 152 to 168,

"affiliated bargaining agent" means a bargaining agent that, according to established trade union practice in the construction industry, represents employees who commonly bargain separately and apart from other employees and is subordinate or directly related to, or is, a provincial, national or international trade union, and includes an employee bargaining agency; ("agent négociateur affilié")

"bargaining", except when used in reference to an affiliated bargaining agent, means province-wide, multi-employer bargaining in the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 126; ("négociation")

"employee bargaining agency" means an organization of affiliated bargaining agents that are subordinate or directly related to the same provincial, national or international trade union, and that may include the parent or related provincial, national or international trade union, formed for purposes that include the representation of affiliated bargaining agents in bargaining and which may be a single provincial, national or international trade union; ("organisme négociateur syndical")

"employer bargaining agency" means an employers' organization or group of employers' organizations formed for purposes that include the representation of employers in bargaining; ("organisme négociateur patronal")

"provincial agreement" means an agreement in writing covering the whole of the Province of Ontario between a designated or accredited employer bargaining agency that represents

employers, on the one hand, and a designated or certified employee bargaining agency that represents affiliated bargaining agents, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer bargaining agency, the employers represented by the employer bargaining agency and for whose employees the affiliated bargaining agents hold bargaining rights, the affiliated bargaining agents represented by the employee bargaining agency, or the employees represented by the affiliated bargaining agents and employed in the industrial, commercial an institutional sector of the construction industry referred to in the definition of "sector" in section 126. ("convention Provinciale")

(2) Where an employer is represented by a designated or accredited employer bargaining agency, the employer shall be deemed to have recognized all of the affiliated bargaining agents represented by a designated or certified employee bargaining agency that bargains with the employer bargaining agency as the bargaining agents for the purpose of collective bargaining in their respective geographic jurisdictions in respect of the employees of the employer employed in the industrial, commercial or institutional sector of the construction industry, referred to in the definition of "sector" in section 126, except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights.

- 157. Where an employer bargaining agency has been designated under section 153 or accredited under section 155 to represent a provincial unit of employers,
 - (a) all rights, duties and obligations under this Act of employers for which it bargains shall vest in the employer bargaining agency, but only for the purpose of conducting bargaining and concluding a provincial agreement; and
 - (b) an accreditation heretofore made under section 136 of an employers' organization as bargaining agent of the employers in the industrial, commercial and institutional sector of the construction industry, referred to in the definition of "sector" in section 126, represented or to be represented by the employer bargaining agency is null and void from the time of such designation under section 153 or accreditation under section 155.

- 161.-(1) Subject to subsection (2), any collective agreement in operation on October 27, 1977 in respect of employees employed in the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 126 and represented by affiliated bargaining agents is enforceable by and binding on the parties thereto only for the remainder of the term of operation of the agreement, regardless of any provision respecting its renewal.
- (2) Despite subsection 58 (1), every collective agreement in respect of employees employed in the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 126 and represented by affiliated bargaining agents entered into after January 1, 1977 and before April 30, 1978 shall be deemed to expire not later than April 30, 1978, regardless of any provision respecting its term of operation or its renewal.
- (3) Where any collective agreement mentioned in subsection (1) ceases to operate, the affiliated bargaining agent, the employer and the employees for whom the affiliated bargaining agent holds bargaining rights shall be bound by the provincial agreement made between an employee bargaining agency representing the affiliated bargaining agent and the employer bargaining agency representing the employer.
- (4) After April 30, 1978, where an affiliated bargaining agent obtains bargaining rights through certification or voluntary recognition in respect of employees employed in the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 126, the employer, the affiliated bargaining agent, and the employees for whom the affiliated bargaining agent has obtained bargaining rights are bound by the provincial agreement made between an employee bargaining agency representing the affiliated bargaining agent

and an employer bargaining agency representing a provincial unit of employers in which the employer would have been included.

(5) Despite subsection 58 (1) where, under the provisions of this section, an employer, affiliated bargaining agent or employees become bound by a provincial agreement after the agreement has commenced to operate, the agreement ceases to be binding on the employer, affiliated bargaining agent or employees in accordance with the terms thereof.

**

- **162.-**(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.
- (2) Subject to sections 153 and 161, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.
- (3) Every provincial agreement shall provide for the expiry of the agreement on April 30 calculated triennially from April 30, 1992.

166. The Board shall, upon the application of a trade union, a council of trade unions, or an employer or employers' organization, determine any question that arises as to whether work performed or to be performed by employees is within the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 126.

We note here for clarification that this issue was argued prior to the passage of the Act, and accordingly during argument reference was made by counsel to the provisions of the previous legislation which correspond to those set out above. As the Act has not changed the substance of the provisions referred to, the argument made by counsel is not affected in any way. Statutory references herein shall be to the current Act.

IV. Argument

- 9. Counsel for Local 1081 asserts that the sector issue raised by Traugott does not truly arise in the circumstances of this case as a result of prior Board jurisprudence and the particular wording of the Provincial Agreement. Article 1.01 of the Provincial Agreement reflects the recognition by the Labourers' employer bargaining agency of the Union (as defined by the Provincial Agreement) as the exclusive bargaining agent for construction labourers in the I.C.I. sector of the construction industry. Accordingly, I.C.I. bargaining rights are clearly covered by the Provincial Agreement.
- 10. Counsel further argues that Article 1.04 extends the Provincial Agreement so as to govern the terms and conditions of employment in other sectors of the construction industry in which Local 1081 has bargaining rights (but no collective agreement) with a particular employer bound by the Provincial Agreement. Counsel notes that the documentary materials which are before the Board establish that Local 1081 has enjoyed "all sector" bargaining rights for construction labourers employed by Traugott since at least August, 1970. There is currently no collective agreement governing the terms and conditions of employment of members of Local 1081 working for Traugott in those non-I.C.I. sectors. Accordingly, by application of Article 1.04 of the Provincial Agreement, the terms of employment reflected by the Provincial Agreement apply to work performed by

construction labourers for Traugott in all other sectors of the construction industry, which in this case includes the work at the two sites in question irrespective of how one characterizes that work. Finally, counsel notes that the subcontracting provision of the Provincial Agreement applies to all work "covered by this Agreement", which would include, on his interpretation of the Provincial Agreement, the work on the two sites in question. During argument counsel referred the Board to *The Jackson-Lewis Company Limited*, [1981] OLRB Rep. Dec. 1794; *London Sandblasting & Painting Limited*, [1982] OLRB Rep. Sept. 1322, and *Rino Zanette (1981) Ltd.*, (unreported, Board File 2058-85-M, January 27, 1986).

- 11. Counsel for Traugott disputed the assertions of law made by counsel for Local 1081. Counsel took the position that as a matter of law an I.C.I. province-wide collective agreement cannot be extended beyond the I.C.I. sector of the construction industry. In the alternative, counsel states that, assuming that such a collective agreement could extend to other sectors of the construction industry beyond the I.C.I. sector, the Provincial Agreement by its terms does not.
- Counsel observed that the term "provincial agreement" is defined by section 151 of the Act, and is limited in its applicability to employees "employed in the industrial, commercial and institutional sector of the construction industry". Similarly, section 161 of the Act, the transition provisions of the Act respecting agreements in effect in 1977 and 1978, refer only to the I.C.I. sector of the construction industry. Counsel submitted that the scheme of the Act makes it clear that province-wide bargaining was only intended to extend to the I.C.I. sector of the construction industry, and not to other sectors. Counsel also noted that the accreditation granted to the Kitchener-Waterloo Construction Association was limited to the I.C.I. sector. Nothing in the legislation, observed counsel, empowers the employer bargaining agencies designated under the Act to bargain beyond the I.C.I. sector of the construction industry. Without any evidence that the Labourers' employer bargaining agency was empowered by its members to negotiate beyond the I.C.I. sector, counsel submitted that the Board could not conclude that the Provincial Agreement extends beyond that sector. It was noted that section 166 of the Act, which provides the Board the authority to make sector determinations, fits in nicely with the scheme of the Act as described by counsel.
- 13. Counsel reviewed the case authorities relied upon by counsel for Local 1081 and asserted that the Board was, in those cases, being asked to determine only whether the work in question was construction work, and went no further.
- With respect to the interpretation of the Provincial Agreement, counsel noted that Articles 1.01 and 2.06 refer only to the I.C.I. sector of the construction industry, and to no other sectors. With regard to the wording of Article 1.04, counsel stated that the wording of the provision was difficult to interpret. In his view, the wording speaks to a future event; that is, if an employer bound by the Provincial Agreement decided to sign an agreement with the Labourers' Union covering the sewer and watermain sector of the construction industry, then Article 1.04 would become applicable and the particular sector agreement would govern the relationship of the parties. Counsel further asserted that the jurisdiction of the Board flows only from the wording of the Provincial Agreement, in accordance with and subject to the Act. As nothing in the Provincial Agreement clearly states that the employers bound by it are bound in all sectors of the construction industry, such a conclusion cannot be reached by the Board.
- 15. In reply argument, counsel for Local 1081 asserted that the province-wide bargaining scheme established by the Act is not "maximum" but rather a "minimum" scheme, and that the employer and employee bargaining agencies can negotiate terms and conditions affecting their members beyond the I.C.I. sector of the construction industry, or even beyond the construction

industry if they so desire. Counsel noted that the Act does not prohibit a province-wide I.C.I. sector agreement from extending beyond that sector, and that the cases relied upon establish that such a limitation does not exist. In any event, noted counsel, the Labourers' employer bargaining agency in this particular case represented to the Labourers' employee bargaining agency by agreeing to the clause in the Provincial Agreement that it had the authority to do so. In these circumstances, if there is a problem of authority then it is one internal to the Labourers' employer bargaining agency and cannot affect the interpretation of the Provincial Agreement.

V. Decision

- 16. In our view, the Board does have the jurisdiction to arbitrate the issues raised in the referral to arbitration filed by Local 1081. Furthermore, we are of the view that it is unnecessary to direct a sector determination in this proceeding. Our reasons for these conclusions follow immediately below.
- Dealing first with the issue of the authority of the Labourers' employer bargaining agency to bind its members to terms and conditions of employment beyond the I.C.I. sector of the construction industry, an almost identical argument to that made by counsel for Traugott was made by counsel for the employer in London Sandblasting & Painting Limited, supra. In that decision, the Ontario Painting Contractors Association negotiated with the Painters' employee bargaining agency a provision in the province-wide I.C.I. collective agreement which applied to both construction work and non-construction work. The union brought a grievance against London Sandblasting in which it alleged that the company was not abiding by the terms of the agreement. The employer asserted that it was only bound to the terms of the province-wide agreement for the purposes of I.C.I. work, for reasons similar to those asserted by Traugott in this case. At paragraph 19 of the decision, the Board addresses the argument made by London Sandblasting.

London, however, is not in the position such as that described in the preceeding paragraph, for London did become a member of the OPCA. Accordingly, the OPCA did have the right to negotiate on behalf of London for the non-I.C.I. sectors of the construction industry as well as for non-construction work. Rather than negotiate a separate agreement or agreements for this work, the Union and the OPCA decided to negotiate a single document which relates to all types of work. We are satisfied that insofar as the I.C.I. sector was concerned, the OPCA was acting on behalf of the designated employer bargaining agency and exercising rights vested under section 143(a) [now section 157(a)]. With respect to the other sectors of the construction industry and non-construction work, however, we are satisfied that it was acting as an employers' association on behalf of its members, including London. Accordingly, we are of the view that London is bound to the agreement not only as a provincial agreement covering the I.C.I. sector, but as a collective agreement covering the other sectors of the construction industry and non-construction work as well.

As noted above, there is no dispute that Traugott is a member of the Grand Valley Construction Association, which, in turn, is an affiliate of the Ontario General Contractors Association, which is a constituent body of the Labourers' employer bargaining agency. There was no suggestion by counsel for Traugott that any of the memberships held by Traugott limited the bargaining authority of the Labourers' employer bargaining agency to the I.C.I. sector of the construction industry.

18. A brief review of the other case authorities relied upon by Local 1081 confirms that the principle established directly above has been applied by the Board in other circumstances. In *The Jackson-Lewis Company Limited, supra*, one of the issues before the Board was whether the inclusion and coverage of "horticulture (landscaping)" work in the Provincial Agreement (as it then read) was a lawful subject for bargaining by the respective designated bargaining agencies. On the facts of that case, the Board concluded that the landscaping work in question was work which fell within the definition of work in the "construction industry", and the Board went on to conclude

that, whether or not the work in question was within the I.C.I. sector of the construction industry (a question which was not for determination before the Board), "horticulture (landscaping)" work such as that before the Board was "a lawful subject for bargaining by the labourers' designated bargaining agencies and the subcontracting of such ... work may be lawfully regulated by the subcontracting provision, clause 2.05, of the agreement".

- 19. On the basis of these authorities, we are satisfied that it was not beyond the authority of the Labourers' employer bargaining agency to negotiate Article 1.04 into the Provincial Agreement.
- 20. Addressing the second question raised by counsel for Traugott; that is, whether the terms of the Provincial Agreement do not apply to the facts of this case, therefore leading to the conclusion that a sector determination of the work must be made, we are of the view that the terms of Article 1.04 of the Provincial Agreement preclude the need for a sector determination. Undoubtedly, the wording contained in Article 1.04 could be drafted more clearly. However, a plain reading of the words contained in the Article allow for only one conclusion: that the parties intended that each employer bound by the Provincial Agreement would apply the terms of the Provincial Agreement to all work performed in all sectors of the construction industry other than the I.C.I. sector if the Labourers' International Union of North America, or one of its affiliated local unions, has bargaining rights with the particular employer and the employer is not bound to another collective agreement governing the work in that sector. In the particular case before us, where it is clear that Local 1081 has previously obtained bargaining rights with respect to Traugott respecting all sectors of the construction industry, if Traugott performs work in the roads or the sewers and watermain sectors of the construction industry, then it is bound to apply the terms of the Provincial Agreement to that work. If Traugott determines that it will sign a roads or a sewers and watermains collective agreement with Local 1081, the terms of those agreements would apply to the particular work in question. This interpretation of Article 1.04 of the Provincial Agreement is supported by the conclusion of the Board in Rino Zanette (1981) Ltd., supra.

VI. Conclusion

- 21. For the reasons outlined above, we conclude that the Board does have the jurisdiction to arbitrate the issues raised in Local 1081's grievance referral, and that it is unnecessary to make a sector determination before continuing with this proceeding.
- 22. This proceeding will continue on a hearing date or dates to be set by the Registrar, after consulting with the parties regarding convenient dates for the hearing.
- 23. This panel is not seized.

COURT PROCEDURES

1490-93-R (Court File No. 51/95) Independent Paperworkers of Canada, Applicant v. Domtar Inc., Communications, Energy and Paperworkers Union of Canada, C.L.C. Local 212 and 338 and the Ontario Labour Relations Board, Respondents

Bargaining Unit - Certification - Judicial Review - IPC seeking to displace CEP Local 338 as bargaining agent for certain maintenance employees of paper mill - CEP Locals 212 and 338 asserting that established bargaining structure involving single bargaining unit including all maintenance and production employees, and that IPC should not be allowed to carve out bargaining unit from existing structure - Board finding that established bargaining structure was one bargaining unit and dismissing IPC's application - IPC's application for judicial review dismissed by Divisional Court

Board decision not reported.

Ontario Court of Justice (General Division) Divisional Court, McMurtry C.J.O.C., Feldman and MacPherson JJ., January 30, 1996.

MacPherson J. (Orally): This is an application under the *Judicial Review Procedure Act* for judicial review of the decision, by majority, of the Ontario Labour Relations Board which refused an application by the applicant union for certification of a group of employees at the Domtar plant in Cornwall.

The applicant's principal contention is that the board's decision was made in excess of its statutory jurisdiction. The applicant's alternative submission is that the board's decision, if made within jurisdiction, was patently unreasonable. We disagree with both of the applicant's submissions.

The board's decision was made pursuant to s.6 of the Labour Relations Act (the "Act"). It decided whether to certify the applicant union. Two board members decided against certification; a dissenting board member would have certified the applicant union. The important point, however, is that all the board members were engaged in the certification decision-making process mandated by s.6 of the Act. Its jurisdiction to do this is, in our view, crystal clear: See Noranda Mines Ltd. v. The Queen et al Labour Relations Board of Saskatchewan v. The Queen (1970) 7 D.L.R. (3d) 1 (S.C.C.). Moreover, there is no other section of the Act which restricts the Board's jurisdiction to do what it did.

The board's decision, within its jurisdiction, is not "patently unreasonable" or "clearly irrational" which is the proper standard of review in a case, like here, where the administrative tribunal's decision is protected by a broad privative clause: See *Attorney General of Canada v. Public Service Alliance of Canada* (S.C.C. 1993). The majority of the board (as well as the dissenting member) considered a full range of historical and current factors relating to the labour relations situation at the Domtar plant in Cornwall. Some of the factors pointed towards certification of the applicant union; some others did not. The board members differed on the proper balancing of those factors. However, it seems clear to us that the board was examining the relevant factors required by s.6 of the Act and the analysis or balancing of those factors, and the result reached, by the majority of the board is not patently unreasonable or clearly irrational.

The application is dismissed. Costs to the respondent union fixed at \$2,500. No costs to the respondent, the Ontario Labour Relations Board.

4307-94-R (Court File No. 943/95) J.P. Murphy Inc., Applicant v. Ontario (Ontario Labour Relations Board) and United Steelworkers of America, Respondents

Certification - Employer Support - Evidence - Intimidation and Coercion - Judicial Review - Natural Justice - Practice and Procedure - Employer's allegations of unlawful employer support for certification application and unlawful intimidation of employees dismissed by Board for disclosing no *prima facie* case - Employer applying for judicial review on several grounds including alleged denial of natural justice - Application for judicial review dismissed by Divisional Court

Board decision not reported.

Ontario Court of Justice (General Division) Divisional Court, Southey, Rutherford and MacPherson JJ., January 25, 1996.

The Court (endorsement): The Board's disposition of the submissions based on s.13 and s.71 of the *Ontario Labour Relations Act* are contained in paras. 17 and 19 of the Decision of October 20, 1995. The former is based on an application of the Board's jurisdiction to the facts of this case. The latter is based on the ordinary meaning of the words in the statute. Neither is patently unreasonable.

In alleging a denial of natural justice, the employer relied principally on three circumstances:

- 1. the receipt by the Board prior to the hearing of an application by the Union under s.91, which had not yet been received by the employer;
- 2. the delay of reasons and the delivery of them only after a request by the Union; and
- 3. the change in the position of one member of the panel from dissent to agreement with the majority.

As to the first, the existence of the s.91 application was disclosed at the hearing on April 18 and 19. We have no particulars of the position respecting the s.91 application taken by counsel for the employer at the hearing.

As to the second, it is by no means clear that the decision of April 20, 1995 was a final decision to which s.17 of the *Statutory Powers Procedure Act* applies. We note that s.17 does not contain any timing requirement.

As to the third, the change in position of the minority panellist, after time for reflection, was of no practical consequence.

None of these circumstances individually, nor all of them cumulatively, are sufficient, in our judgment, to give rise to a reasonable apprehension of bias. Nor did they constitute a denial of natural justice.

The application is dismissed with costs to the respondent Union, which, by agreement of counsel, are fixed at \$3,000.

0096-92-G; 0097-92-G; 0564-92-R; 0239-92-G; 0565-92-R; 1834-92-G; 1835-92-R (Court File No. 650/94) International Brotherhood of Electrical Workers, Local 105; International Brotherhood of Painters and Allied Trades, Locals 205 and 1824; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 67, Applicants v. Robertson-Yates Corporation Limited and The Ontario Labour Relations Board, Respondents

Collective Agreement - Construction Industry - Judicial Review - Voluntary Recognition - Related Employer - Sale of a Business - Board finding that 1966 sale transaction between "old RYCO" and "new RYCO" not giving rise to "successor rights" obligations because 1957 Working Agreement entered into by "old RYCO" was "recognition agreement" and not "collective agreement" - Board declining to declare "old RYCO" and "new RYCO" related employers in circumstances where the companies ceased carrying on related or associated activities or businesses several years prior to enactment of subsection 1(4) of the Act - Sale of business and related employer applications dismissed - Unions' application for judicial review dismissed by Divisional Court

Board decision not reported.

Ontario Court of Justice (General Division) Divisional Court, McMurtry C.J.O.C., Feldman and MacPherson JJ., January 29, 1996.

Feldman J.(Orally): Mr. Minsky raises two grounds of objection to the decision of The Ontario Labour Relations Board (the "Board") in this matter. One, that under s.64 of the *Labour Relations Act*, R.S.O. 1990, c.L.2 as it read in 1992, the determination of whether there was a collective agreement is a provision limiting the power of the tribunal and therefore an error will cause the Board to lose jurisdiction. Two, that the Board's decision that old RYCO and new RYCO did not carry on associated or related activities was patently unreasonable or clearly irrational.

- 1. On the first issue, we agree that s.64(1) could raise a jurisdictional issue. However, in this case, there is nothing to suggest that the Board misconstrued its jurisdiction or failed to apply the definition of collective agreement in the Act in its consideration of whether the working agreement was a collective agreement or a recognition agreement. We therefore find no error of jurisdiction.
- 2. In respect of the second issue, although we may well have come to the conclusion submitted by the applicant that the activities of the two businesses were related or associated within the meaning of s.1(4) of the Act, we are not satisfied that the conclusion reached by the Board was clearly irrational and therefore we are not prepared to interfere.

Therefore the application is dismissed on both grounds.







CASE LISTINGS DECEMBER 1995

	PAGE
1.	Applications for Certification
2.	Applications for Combination of Bargaining Units
3.	Applications for First Contract Arbitration
4.	Applications for Declaration of Related Employer
5.	Sale of a Business
6.	Section 64.2 - Successor Rights/Contract Services
7.	Applications for Declaration Terminating Bargaining Rights
8.	Ministerial Reference (Board of Arbitration)
9.	Applications for Declaration of Unlawful Strike
10.	Applications for Declaration of Unlawful Strike (Construction Industry)
11.	Applications for Direction Respecting Unlawful Lockout
12.	Complaints of Unfair Labour Practice
13.	Applications for Interim Order
14.	Applications for Consent to Early Termination of Collective Agreement
15.	Jurisdictional Disputes
16.	Applications for Determination of Employee Status
17.	Complaints under the Occupational Health and Safety Act
18.	Environmental Protection Act
19.	Crown Employees Collective Bargaining Act (Sec. 36.1)
20.	Construction Industry Grievances
21	Applications for Peconsideration of Roard's Decision 24

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1995

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

3759-93-R: Ontario Nurses' Association (Applicant) v. Niagara-On-The-Lake General Hospital (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by Niagara-On-The Lake General Hospital in the Town of Niagara-On-The-Lake in the Region of Niagara, save and except Nurse Managers, persons above the rank of Nurse Manager and Discharge Planning Co- ordinator" (16 employees in unit)

2732-94-R: Ontario Nurses' Association (Applicant) v. Capricorn Investments Limited c.o.b. as Elgin Abbey Nursing Home (Respondent)

Unit: "all Registered and Graduate Nurses employed by Capricorn Investments Limited c.o.b. as Elgin Abbey Nursing Home in the Town of Chelsey, save and except the Director of Care and persons above the rank of Director of Care" (7 employees in unit)

1106-95-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 634 (Applicant) v. 1085803 Ontario Limited c.o.b. as Grand Theatre Centre of Sudbury (Respondent)

Unit: "all stage employees of 1085803 Ontario Limited c.o.b. as Grand Theatre Centre of Sudbury, in the Regional Municipality of Sudbury, save and except Theatre Manager and persons above the rank of Theatre Manager" (4 employees in unit)

1433-95-R: Canadian Union of Public Employees (Applicant) v. Prescott Public Utilities Commission (Respondent)

Unit: "all employees of Prescott Public Utilities Commission in the Town of Prescott, save and except General Manager and persons above the rank of General Manager." (11 employees in unit)

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2127-95-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. International Care Corporation (Respondent)

Unit: "all employees of International Care Corporation employed at Donway Place and Don Mills Seniors Apartments in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff, Activity Director and persons regularly employed for more than 24 hours per week" (60 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list	76
Number of persons who cast ballots	35
Number of ballots excluding segregated ballots cast by persons whose	e names appear on
voter's list	33
Number of segregated ballots cast by persons whose names appear of	n voter's list 2
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	2

2662-95-R: Halton Instructional Assistants Association (Applicant) v. Halton Board of Education (Respondent)

Unit: "all persons employed as Instructional Assistants by the Halton Board of Education" (484 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list	492
Number of persons who cast ballots	388
Number of ballots excluding segregated ballots cast by persons whose names appear or	1
voter's list	388
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	368
Number of ballots marked against applicant	19

2663-95-R: Christian Labour Association of Canada (Applicant) v. Birmingham Lodge Retirement Residence (Respondent)

Unit: "all employees of Birmingham Lodge Retirement Residence in the Town of Mount Forest, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (22 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	6

2680-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Empire Maintenance Industries Inc. (Respondent)

Unit: "all employees of Empire Maintenance Industries Inc. engaged in cleaning and maintenance at 2225, 2235, 2255 Sheppard Avenue East, in the Municipality of Metropolitan Toronto, save and except non-working forepersons, persons above the rank of non-working foreperson, office and sales staff" (37 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list 40	
Number of persons who cast ballots	38
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	37
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	29
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	1

2730-95-R: Canadian Union of Public Employees (Applicant) v. York Shelter for Women (Respondent)

Unit: "all employees of York Shelter for Women in the Municipality of Metropolitan Toronto, save and except Executive Director" (12 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	12
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	0

2756-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Capital Properties Limited Partnership c.o.b. as Travelodge Ingersoll (Respondent)

Unit: "all employees of Capital Properties Limited Partnership c.o.b. as Travelodge Ingersoll at its Hotel located at 20 Samnah Crescent in the Town of Ingersoll, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff, audit staff, accounting staff, management trainees, front desk staff, reservations staff, security staff, and students employed during the school vacation period" (12 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	4

2765-95-R: Canadian Union of Public Employees (Applicant) v. Ottawa Salus Corporation (Respondent)

Unit: "all employees of the Ottawa Salus Corporation in the Regional Municipality of Ottawa Carleton, save and except Service Coordinators, Property Coordinators, persons above the rank of Service Coordinator and Property Coordinator, Administrative Assistant/Bookkeeper and a Confidential Secretary" (34 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	35
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	2

2775-95-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Servocraft Limited (Respondent)

Unit: "all journeymen and apprentice refrigeration and air conditioning mechanics in the employ of Servocraft Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice refrigeration and air conditioning mechanics in the employ of Servocraft Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

Unit: "all registered and graduate nurses employed in a nursing capacity by Smooth Rock Falls Hospital in Smooth Rock Falls, Ontario, save and except supervisors, persons above the rank of supervisor, Long Term Care Co-ordinator and In-Service Co-ordinator" (13 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	10
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	0

2927-95-R: Ontario Sheet Metal Workers' & Roofers' Conference, Sheet Metal Workers' International Association (Applicants) v. #362262 Ontario Limited, c.o.b. as Baden Sheet Metal (Respondent)

Unit: "all journeymen and apprentice sheet metal workers in the employ of 362262 Ontario Limited, c.o.b. as Baden Sheet Metal, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice sheet metal workers in the employ of 362262 Ontario Limited, c.o.b. as Baden Sheet Metal, in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (15 employees in unit)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	18
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	0

2931-95-R: Association of Allied Health Professionals: Ontario (Applicant) v. Toronto East General and Orthopaedic Hospital Inc. (Respondent) v. Service Employees International Union, Local 204 (Intervener)

Unit: "all paramedical personnel employed by Toronto East General and Orthopaedic Hospital Inc. in the Regional Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week in the Diagnostic Imaging, Laboratory Medicine, Nuclear Medicine, Respiratory, Cardiac Labs, Pharmacy, Medical Illustration, In Vitro Fertilization departments and the Operating Room, save and except chief technologists, assistant chief technologists, persons above the rank of charge technologist and assistant chief technologist, teaching supervisors, students in training, and office and clerical staff, and persons for whom any other trade union held bargaining rights as of November 2, 1995" (47 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2946-95-R: Labourers' International Union of North America Local 183 (Applicant) v. Sanitary Maintenance Systems (Respondent)

Unit: "all employees of Sanitary Maintenance Systems engaged in cleaning and maintenance at 90 Eastdale Avenue and 2275 Victoria Park Avenue, in the Municipality of Metropolitan Toronto, save and except non-

working forepersons, persons above the rank of non-working foreperson, office and clerical staff' (5 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	4
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0

2951-95-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (Applicant) v. Ro-Matt International Inc. (Respondent)

Unit: "all employees of Ro-Matt International Inc. in the Township of Sandwich South, save and except supervisors, persons above the rank of supervisor, office and sales staff" (5 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on	Λ
voter's list Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2962-95-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. International Brotherhood of Electrical Workers Local Union 303, (Respondent)

Unit: "all office and clerical employees of the International Brotherhood of Electrical Workers Local Union 303, at their offices in the Regional Municipality of Niagara, save and except business manager and persons above the rank of business manager" (2 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	()

2973-95-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Heaton Sanitation Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

Unit: "all employees of Heaton Sanitation Ltd. in the classifications of operator/labourer and labourer employed in the Province of Ontario, save and except managers and those above the rank of manager" (16 employees in unit) ((Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	13
Number of ballots, excluding segregated ballots, cast by persons whose names appear on	
voters' list	13
Number of segregated ballots cast by persons whose names appear on voters' list	0
Number of spoiled ballots	0

Number of ballots marked in favour of applicant	12
Number of ballots marked in favour of intervener	1
Number of ballots segregated and not counted	0

3071-95-R: Christian Labour Association of Canada (Applicant) v. Specialty Care Inc. c.o.b. as Cedarvale Lodge (Respondent) v. Service Employees International Union, Local 204 affiliated with A.F. of L., C.I.O., C.L.C. (Intervener)

Unit: "all employees of Specialty Care Inc. c.o.b. as Cedarvale Lodge in Keswick, save and except supervisors, persons above the rank of supervisors, registered, graduate, and undergraduate nurses, professional medical staff, paramedical employees, activation director, recreation co-ordinator, office and clerical staff" (71 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	71
Number of persons who cast ballots	52
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	51
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	34
Number of ballots marked in favour of intervener	16
Number of ballots segregated and not counted	1

3077-95-R: Ontario Nurses' Association (Applicant) v. Victoria Nursing Home (Respondent)

Unit: "all registered and graduate nurses employed by Victoria Nursing Home in the City of Hamilton, save and except the Director of Nursing, persons above the rank of Director of Nursing and persons for whom any trade union held bargaining rights as of November 15, 1995" (6 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	6
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	1

3090-95-R: Communications, Energy and Paperworkers Union of Canada Local 87-M Southern Ontario Newspaper Guild (Applicant) v. Toronto Real Estate Board (Respondent)

Unit: "all employees of the Toronto Real Estate Board in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons employed in the Real Estate News and Information Services staff," (60 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list	63	
Number of persons who cast ballots	62	
Number of ballots excluding segregated ballots cast by persons whose names appear on		
voter's list	62	
Number of segregated ballots cast by persons whose names appear on voter's list	0	
Number of segregated ballots cast by persons whose names do not appear on voters' list	0	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	48	
Number of ballots marked against applicant	13	
Number of ballots segregated and not counted	0	

3137-95-R: Public Service Alliance of Canada (Applicant) v. Salvation Army Ottawa Booth Centre (Respondent)

Unit: "all employees of the Salvation Army Ottawa Booth Centre employed at the Booth Centre Men's Hostel and Youth Shelter at 171 George Street and Anchorage Men's Addiction and Rehabilitation Centre at 175 George Street in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, employees of the Salvation Army Thrift Store, Clergy Executive Assistant, Payroll Clerk, Human Resources Clerk, Residential Program Clients working for ad hoc shifts/special programs, workers doing court ordered work, and recipients of SSEP employment grants" (42 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list Number of persons who cast ballots	63 57
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	44
Number of segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	33
Number of ballots marked against applicant	19
Number of ballots segregated and not counted	4

3182-95-R: Brewery, General and Professional Workers Union (Applicant) v. Labatts Ontario Breweries Division of Labatt Brewing Company Limited (Respondent) v. International Union of Operating Engineers Local 772 (Intervener)

Unit: "all employees of Labatts Ontario Breweries Division of Labatt Brewing Company Limited employed as stationary engineers and their helpers at its powerhouse in London, with the exception of chief engineers and persons above the rank of chief engineers" (10 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on	4.0
voter's list	10
Number of ballots marked in favour of applicant	10

3217-95-R: Local Union 47 Sheet Metal Workers' International Association (Applicant) v. Nu-Tek Signs Inc. (Respondent)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of Nu-Tek Signs Inc., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of Nu-Tek in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of persons who east bands Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots east by persons whose names do not appear on voters' list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	-
Number of ballots marked against applicant	0

Applications for Certification Dismissed Without Vote

1320-95-R: Association of Law Officers of the Crown (Applicant) v. The Crown in Right of Ontario (Respon-

dent) v. Association of Management, Administrative and Professional Crown Employees of Ontario (AMAPCEO), Ontario Public Service Employees Union (OPSEU) (Interveners)

2848-95-R: United Food and Commercial Workers International Union (Applicant) v. Fleming Chicks Limited (Respondent)

2849-95-R: United Food and Commercial Workers International Union (Applicant) v. Kingsville Mushroom Farms Inc. (Respondent)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2564-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Falcon Plastics Incorporated (Respondent)

Unit #1: "all employees of Falcon Plastics Incorporated in the City of London, save and except Shift Supervisor, persons above the rank of Shift Supervisor, clerical, accounting and sales staff" (62 employees in unit)

Number of names of persons on revised voters' list	54
Number of persons who cast ballots	53
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	28

2757-95-R: United Food and Commercial Workers International Union (Applicant) v. Sandra Tea and Coffee Limited (Respondent) v. Christene Bountas (Objectors)

Unit #1: "all employees of Sandra Tea and Coffee Limited in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (75 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	87
Number of persons who cast ballots	85
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	84
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	33
Number of ballots marked against applicant	51
Number of ballots segregated and not counted	1

2980-95-R: National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Titan Tool & Die Limited (Respondent)

Unit #1: "all employees of Titan Tool & Die Limited in the City of Windsor, save and except supervisors, persons above the rank of supervisor, office and sales staff and students employed during the school vacation period" (112 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	112
Number of persons who cast ballots	110
Number of ballots excluding segregated ballots cast by persons whose names appear on	110
voter's list	101
Number of segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	50
Number of ballots marked against applicant	52
Number of ballots segregated and not counted	8

3054-95-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Lullabies of London, Division of Tender Tootsies Limited (Respondent)

Unit #1: "all employees of Lullabies of London, Division of Tender Tootsies Limited employed in the Town of Mount Brydges, Middlesex County, Ontario, save and except supervisors and persons above the rank of supervisor, sales, engineering, clerical and office staff" (118 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	171
Number of persons who cast ballots	159
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	147
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names do not appear on voters' list	5
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	45
Number of ballots marked against applicant	110

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

4200-94-R: Ontario Liquor Boards Employees' Union (Applicant) v. Blue Water Bridge Duty Free Shop Inc. (Respondent)

Unit: "all employees of Blue Water Bridge Duty Free Shop Inc. in the Village of Point Edward, save and except supervisors and persons above the rank of supervisor, office and clerical staff" (33 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	38 38
Number of persons who cast ballots	50
Number of ballots excluding segregated ballots cast by persons whose names appear on	33
voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of applicant	29
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	5

0607-95-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, and Ontario Pipe Trades Council (Applicant) v. Elta Gas Services Ltd. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices and construction labourers in the employ of Elta Gas Services Ltd. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman" (40 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list Number of persons who cast ballots	44 40
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	40
Number of segregated hallots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters list	0
Number of spoiled ballots	16
Number of ballots marked in favour of applicant Number of ballots marked against applicant	24
Number of ballots segregated and not counted	0

Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. The Salvation Army Metropolitan Toronto Recycling Centre, Mississauga Thrift Store (Respondent)

Unit: "all employees of The Salvation Army Metropolitan Toronto Recycling Centre, Mississauga Thrift Store at 1458 Dundas Street East, Mississauga, Ontario, save and except assistant supervisors, assistant store managers, persons above the rank of assistant supervisor and assistant store manager, office, clerical, accounting and administrative staff, Salvation Army Officers, and persons enrolled in programs offered by the Salvation Army" (12 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list Number of persons who cast ballots Number of ballots excluding segregated ballots cast by persons whose names appear on	18 14
voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	2

2009-95-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Trafalgar Distribution Services (A Division of 820990 Ontario Inc.) (Respondent)

Unit: "all employees of Trafalgar Distribution Services (a division of 820990 Ontario Inc.), located at the warehouses at 2125A South Service Road, 2009 Wyecroft Road and 2390 Wyecroft Road in the Town of Oakville, save and except Supervisors, persons above the rank of Supervisor, office, clerical, sales, technical and cleaning staff, students employed during the school vacation period and dispatchers" (25 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
	21
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	14
Number of ballots segregated and not counted	1

2700-95-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A. F. of L., C.I.O., C.L.C. (Applicant) v. The Kiwanis Club of Casa Loma (Respondent)

Unit: "all employees of The Kiwanis Club of Casa Loma in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, curatorial, and sales staff, and employees in a bargaining unit for which any trade union held bargaining rights as of October 18, 1995" (47 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	60
Number of persons who cast ballots	48
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	,,
	47
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	
Number of ballets and I have a supplicant	18
Number of ballots marked against applicant	29
Number of ballots segregated and not counted	1
0 0	1

2893-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Ogden Allied Services Inc. (Respondent)

Unit: "all employees of Ogden Allied Services Inc. engaged in cleaning and maintenance at 20 Queen Street West, in the Municipality of Metropolitan Toronto, save and except forepersons and persons above the rank of foreperson" (30 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	37
Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	32
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	19

2995-95-R: Ontario Public Service Employees Union (Applicant) v. Charlotte Eleanor Englehart Hospital (Respondent)

Unit: "all paramedical and technical employees of the Charlotte Eleanor Englehart Hospital, in the Town of Petrolia, save and except chief technologists, persons above the rank of chief technologist and persons for whom any trade union held bargaining rights as of November 8, 1995" (16 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list Number of persons who cast ballots	16 14
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	0

3099-95-R: Teamsters Local Union 938 (Applicant) v. Nouzon Holdings Limited (Respondent)

Unit: "all employees of Nouzon Holdings Limited working in and out of the Town of Chapleau, save and except supervisors and those above the rank of supervisor" (13 employees in unit) (Having regard to the agreement of the parties)

y A '	
Number of names of persons on revised voters' list	14
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of sponed various	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	U

3183-95-R: Ontario Public Service Employees Union (Applicant) v. Orillia and District Association for Community Living (Respondent)

Unit: "all employees of Orillia and District Association for Community Living in the County of Simcoe, save and except supervisors, persons above the rank of supervisor, office and clerical employees, clients working at Orillia Wood Working and any persons for whom any trade union held bargaining rights as of November 27, 1995" (90 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	90
Number of persons who cast ballots	81
Number of ballots excluding segregated ballots cast by persons whose names appear	on
voter's list	81
Number of ballots marked in favour of applicant	40
Number of ballots marked against applicant	41

3238-95-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Westin Hotel, Ottawa (Respondent)

Unit: "all employees in the accounting department of the Westin Hotel, Ottawa in the City of Ottawa, save and except the accounting manager, persons above the rank of accounting manager and the payroll administrator" (9 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	1

Applications for Certification Withdrawn

0864-95-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Doef's Ironworks Ltd. (Respondent)

1802-95-R: United Steelworkers of America (Applicant) v. 622111 Ontario Limited and 1017522 Ontario Limited c.o.b. Tim Hortons Donuts (Respondent) v. Group of Employees (Objectors)

2819-95-R: Local Union 636 of the International Brotherhood of Electrical Workers (Applicant) v. Custom Cryogenic Grinding Corp. (Respondent) v. United Steelworkers of America (Intervener)

3031-95-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Richard Hammond & Associates (Respondent)

3033-95-R: Canadian Union of Public Employees (Applicant) v. The Brotherhood Foundation c.o.b. as The Wexford (Respondent) v. Christian Labour Association of Canada (Intervener)

3061-95-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Hospitality Services (Respondent)

3072-95-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Dundee Contracting Inc. (Respondent)

3164-95-R: United Paperworkers International Union (Applicant) v. Birchwood Terrace Thunder Bay District Home for the Aged (Respondent)

3308-95-R: United Steelworkers of America (Applicant) v. Kitchens of Sara Lee, Canada Ltd. (Respondent)

3366-95-R: Canadian Union of Public Employees (Applicant) v. Regional Municipality of Waterloo (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

1274-95-R: 1275-95-R: United Food and Commercial Workers International Local 633 (Applicant) v. 772685 Ontario Limited and Robert Huffman, 567356 Ontario Inc. c.o.b. LOEB Fisher Street, 810048 Ontario Limited carrying on business as LOEB Highland, 729685 Ontario Limited, c.o.b. as Loeb Montgomery, LOEB Parkways West, LOEB Pembroke, 855436 Ontario Limited and Jim Willis, LOEB Princess Street, LOEB Rose City, LOEB Sandalwood, 561270 Ontario Inc. carrying on business as LOEB St. Laurent, Hanley Foods Inc. carrying on business as LOEB Walker Place, LOEB Wharncliffe, LOEB Wycliffe Village, LOEB Inc. (Corporate Office) (Respondents); United Food and Commercial Workers International Local 175 (Applicant) v. LOEB Blackburn Hamlet, 567356 Ontario Inc., c.o.b. LOEB Club Plus Fisher Street, LOEB Greenbank, LOEB Highland, 900501 Ontario Ltd., Phil's Leamington Foods, 853807 Ontario Ltd. carrying on business as LOEB McArthur, 727989 Ontario Limited carrying on business as LOEB Meadowlands, 729685 Ontario Limited, c.o.b. as Loeb Montgomery, LOEB Parkways West, LOEB Pembroke, 855436 Ontario Limited and Jim Willis, Maranatha Groceries Ltd. carrying on business as LOEB Rockland, LOEB Rose City, LOEB Sandalwood, 857734 Ontario Ltd. carrying on business as LOEB Southgate, LOEB Southside, 561270 Ontario Inc. carrying on business as LOEB St. Laurent, Hanley Foods Inc. carrying on business as LOEB Walker Place, J. Raheb Enterprises Inc. c.o.b. Loeb West Grand, Mico Inc. c.o.b. LOEB Westminster, Knight Holdings Inc. c.o.b. as Loeb Wharncliffe, 851293 Ontario Inc. cob Loeb William Street, LOEB Wycliffe Village, LOEB Inc. (Corporate Office) (Respondents) (Terminated)

2748-95-R: Canadian Union of Public Employees (Applicant) v. The Board of Education for the City of York (Respondent) (*Withdrawn*)

FIRST AGREEMENT - DIRECTION

3106-95-FC: International Union of Operating Engineers, Local 793 (Applicant) v. The Corporation of the Town of New Tecumseh (Respondent) (*Dismissed*)

3353-95-FC: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Dualex Enterprises Inc., a Division of Depco International Incorporated (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1000-93-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Marine Pipeline Construction of Canada Limited and Premier Murphy (Respondents) (Withdrawn)

3453-94-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Redan Drywall Inc., Keyon Dry Wall Inc. (Respondents) (Endorsed Settlement)

3582-94-R: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Aikenhead's Home Improvement Warehouse Inc. and Home Depot of Canada Inc., 3033023 Canada Limited (Respondents) (*Endorsed Settlement*)

1273-95-R: United Food and Commercial Workers International Locals 175 and 633 (Applicant) v. 772685 Ontario Limited and Robert Huffman, LOEB Blackburn Hamlet, 567356 Ontario Inc., c.o.b. LOEB Club Plus Fisher Street, LOEB Greenbank, 810048 Ontario Limited carrying on business as LOEB Highland, 900501 Ontario Ltd., c/o Loeb Huron, Phil's Leamington Foods, 853807 Ontario Ltd. carrying on business as LOEB McArthur, 727989 Ontario Limited carrying on business as LOEB Meadowlands, LOEB Montgomery, LOEB Parkways West, LOEB Pembroke, 855436 Ontario Limited and Jim Willis, Maranatha Groceries Ltd. carrying on business as LOEB Rockland, LOEB Rose City, LOEB Sandalwood, 857734 Ontario Ltd. carrying on business as LOEB Southgate, LOEB Southside, 561270 Ontario Inc. carrying on business as LOEB St. Laurent, Hanley Foods Inc. carrying on business as LOEB Walker Place, J. Raheb Enterprises

Inc. c.o.b. LOEB West Grand, Mico Inc. c.o.b. LOEB Westminster, Knight Holdings Inc. c.o.b. as Loeb Wharncliffe, 851293 Ontario Inc. cob LOEB William Street, LOEB Wycliffe, LOEB Inc. (Corporate Office) (Respondents) (Withdrawn)

1450-95-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Na-Me-Res (Native Men's Residence) (Respondent) (*Dismissed*)

2106-95-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lay-All Drywall Ltd., L.S.R. Drywall Ltd. and Jonsmeg Drywall Limited (Respondents) (*Granted*)

2202-95-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Panton Peel Carpet Services and N.C.S. Carpet Ltd. (Respondents) (*Endorsed Settlement*)

2706-94-R; 2949-94-R: United Brotherhood of Carpenters and Joiners of America, Locals 2222, 2050 and 2451 (Applicant) v. Ellis-Don Limited, Ellis-Don Construction Ltd., Ellis-Don Forming Ltd., B & D Support Services Inc. (Respondents) v. Labourers' International Union of North America, Ontario Provincial District Council, Labourers' International Union of North America, Local 1059, Labourers' International Union of North America, Ontario Provincial District Council, Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Local 1081 (Applicant) v. Ellis-Don Limited, Ellis-Don Construction Ltd., Ellis Don Forming Ltd., B & D Support Services Inc. (Respondents) (Endorsed Settlement)

3014-95-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Local 663 (Applicant) v. Markson Construction Services Inc., and Terra International (Canada) Inc. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

2706-94-R; 2949-94-R: United Brotherhood of Carpenters and Joiners of America, Locals 2222, 2050 and 2451 (Applicant) v. Ellis-Don Limited, Ellis-Don Construction Ltd., Ellis-Don Forming Ltd., B & D Support Services Inc. (Respondents) v. Labourers' International Union of North America, Ontario Provincial District Council, Labourers' International Union of North America, Local 1059, Labourers' International Union of North America, Ontario Provincial District Council, Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Local 1081 (Applicant) v. Ellis-Don Limited, Ellis-Don Construction Ltd., Ellis Don Forming Ltd., B & D Support Services Inc. (Respondents) (Endorsed Settlement)

3453-94-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Redan Drywall Inc., Keyon Dry Wall Inc. (Respondents) (*Endorsed Settlement*)

3582-94-R: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Aikenhead's Home Improvement Warehouse Inc. and Home Depot of Canada Inc., 3033023 Canada Limited (Respondents) (*Endorsed Settlement*)

1450-95-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Na-Me-Res (Native Men's Residence) (Respondent) (Dismissed)

2106-95-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lay-All Drywall Ltd., L.S.R. Drywall Ltd. and Jonsmeg Drywall Limited (Respondents) (*Granted*)

2185-95-R: Windsor Regional Hospital (Applicant) v. International Brotherhood of Electrical Workers, Local 636 and Canadian Union of Public Employees, Local 1681 (Respondents) (*Granted*)

2202-95-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Panton Peel Carpet Services and N.C.S. Carpet Ltd. (Respondents) (Endorsed Settlement)

SECTION 64.2 - SUCCESSOR RIGHTS - PREDECESSOR/SUCCESSOR

0858-95-R: The Perley Hospital (Applicant) v. Canadian Union of Public Employees, Local 870, Ontario Nurses Association, Local 149, Professional Institute of the Public Service of Canada and Public Service Alliance of Canada (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2317-95-R: Anne Touchette (Applicant) v. Ontario Public Service Employees Union (Respondent) v. The Crown in Right of Ontario (as represented by Management Board of Cabinet) (Intervener) (*Dismissed*)

2502-95-R: Employees of Doug Roe Enterprises Ltd. o/a Mid Ontario Disposal (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Doug Roe Enterprises Ltd. o/a Mid Ontario Disposal (Intervener)

Unit: "all employees of the Company working in the County of Simcoe, including persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, sales, office and clerical staff" (47 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	48
Number of persons who cast ballots	45
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	43
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	2
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	38
Number of ballots segregated and not counted	2

2556-95-R: Neal Brooks (Applicant) v. United Steelworkers of America (Respondent) v. A.W.L. Steego, a Division of McKerlie Millen, Ontario (Intervener)

Unit: "all employees of A.W.L. Steego working in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff" (63 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	64 61
Number of persons who cast ballots	01
Number of ballots excluding segregated ballots cast by persons whose names appear on	61
voter's list	61
Number of spoiled ballots	27
Number of ballots marked in favour of respondent	21
Number of ballots marked against respondent	34
Number of ballots segregated and not counted	U

2583-95-R: Gail Alexendra McCormick (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 chartered by the Hotel Employees and Restaurant Employees International Union (Respondent) v. C.A.W. - Canada Family Education Centre (Intervener)

Unit: "all employees of the C.A.W. Family Education Centre at Saugeen Township, R.R. #1, Port Elgin, Ontario, save and except the Director, persons above the rank of Director, C.A.W. national staff members,

all salaried supervisors, all office personnel including secretaries, bookkeepers, front desk personnel and child care workers" (75 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	75
Number of persons who cast ballots	68
Number of ballots excluding segregated ballots cast by persons whose names appear	on
voter's list	68
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters'	list 0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	66
Number of ballots segregated and not counted	0

2784-95-R: Chris Laskey and Terrance W. Trenholm (Applicant) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Respondent) v. Q-Tech Limited (Intervener) (*Dismissed*)

2925-95-R: Employees of Hammerson Properties Inc. (formerly Sifton Properties Ltd) Stone Road Mall (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Respondent) v. Hammerson Properties Inc. (Intervener)

Unit: "all employees of [the employer] at Stone Road Mall, 435 Stone Road, Guelph, Ontario set out in Schedule A, save and except managers and supervisors and persons above the rank of manager and supervisor, office, clerical, engineering, sales and technical staff" (35 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	37
Number of persons who cast ballots	31
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	31
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	10
Number of ballots marked against respondent	21
Number of ballots segregated and not counted	0

3056-95-R: Commonwealth Plywood Company Limited, Gerald Desloges (Applicants) v. Labourers' International Union of North America, Local 493 (Respondent) (*Granted*)

3145-95-R: The Ontario Club Employees (Applicant) v. Christian Labour Association of Canada (Respondent) (Dismissed)

3147-95-R; **3404-95-R**: Robert Bradley McIlroy (Applicant) v. Canadian Security Union (Respondent); Martin Stanley Miksovsky (Applicant) v. Canadian Security Union (Respondent) v. Intercon Security Ltd. (Intervener) (*Granted*)

3351-95-R: Joe Henderson (Applicant) v. CAW (Respondent) (Granted)

3396-95-R: Petrolia And District Ambulance Services Inc. (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Dismissed*)

REFERRAL FROM MINISTER

2448-95-M: Cambrian Alliance Protection Services Inc. (Applicant) v. United Steelworkers of America, Local 5297, Canadian Security Union (Respondents) (*Endorsed Settlement*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

3417-95-U: The Corporation of the City of Oshawa (Applicant) v. The Canadian Union of Public Employees (CUPE) and its Local 250, and its Officers, Officials and agents set out in schedule "A" (Respondent) (Withdrawn)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

3323-95-U: Dominion Sheet Metal and Roofing Work (Applicant) v. Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America and Stephen Wolfries and Harold Biso (Respondent) (*Terminated*)

DIRECTION RESPECTING UNLAWFUL LOCKOUT (INDUSTRIAL)

3444-95-U: Ontario Public Service Employees Union (Applicant) v. Sea Land Holding Corp. c.o.b. as Great Lakes College of Toronto (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

4342-93-U: Lorenzo Scalfari (Applicant) v. Canadian Union of Public Employees, Local 1356 York University (Respondent) (*Granted*)

1284-94-U: Karam Singh (Applicant) v. Alumiprime Windows Limited, United Steelworkers of America (Respondents) (Withdrawn)

4227-94-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Granville Constructors Ltd. and Ravico Contracting Ltd. (Respondents) (*Terminated*)

0777-95-U: United Steelworkers of America (Applicant) v. Pembroke Civic Hospital (Respondent) (Granted)

0873-95-U: United Food and Commercial Workers International Union, Local 175 and Rui Almeida (Applicants) v. Zellers Inc. (Respondent) (*Withdrawn*)

1201-95-U: Luis Camara, John Teffer, Frank D'Abbondanza and Labourers' International Union of North America, Local 183 (Applicant) v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Jim Smith and Ucal Powell (Respondent) (Dismissed)

1451-95-U: Canadian Union of Operating Engineers and General Workers (Applicant) v. Na-Me-Res (Native Men's Residence) and Native Leasing Services Inc. and G. James Fyshe (Respondents) (*Dismissed*)

1728-95-U: Lise Favreau (Applicant) v. The Crown in Right of Ontario, Ontario Public Service Employees Union (Respondents) (Dismissed)

1730-95-U: International Ladies Garment Workers Union (Applicant) v. Pantorama Industries Inc. (Respondent) (Withdrawn)

1873-95-U: United Brotherhood of Carpenters and Joiners of America, Local 1072 (Applicant) v. Coldmatic Refrigeration of Canada Limited, Clark Door Incorporated, Mr. George Zafir, Mr. Brian Palmer (Respondents) (*Endorsed Settlement*)

1917-95-U: Penelope E. Kert-Kuzmick (Applicant) v. Hotel & Restaurant Employees' & Bartenders' International Union - Local 280 (Respondent) v. The Ontario Jockey Club (Intervener) (*Withdrawn*)

2008-95-U: Karen L. Barclay (Applicant) v. Canadian Union of Public Employees, Local 786 (Respondent) v. St. Joseph's Hospital (Intervener) (*Withdrawn*)

2034-95-U: The ACTRA Performers Guild a member of the Alliance of Canadian Cinema, Television & Radio Artists (ACTRA) (Applicant) v. The Canadian Film and Television Production Association (Respondent) (Withdrawn)

2166-95-U: Teamsters Local Union 938 (Applicant) v. Skanna Systems Investigations Inc. (Respondent) (Withdrawn)

2224-95-U: Elizabeth Jones (Applicant) v. Communications, Energy and Paperworkers Union (9670) (Respondent) v. Celanese Canada Inc. (Intervener) (Dismissed)

2238-95-U: Ontario Public Service Employees Union and Ontario Public Service Employees Union, Local 358 (Applicant) v. Peterborough and District Association for Community Living, John Moore, Jack Gillan, Patrick McNamara, Gino D'Amico and Ben Taylor (Respondent) (Withdrawn)

2330-95-U: Union of Needletrades, Industrial and Textile Employees (Formerly International Ladies' Garment Workers' Union) (Applicant) v. Pantorama Industries Inc. (Respondent) (Withdrawn)

2486-95-U: Labourers' International Union of North America, Local 183 (Applicant) v. Calsper Developments Inc. (Respondent) (Withdrawn)

2517-95-U: Beverley A. Wright (Applicant) v. The Ontario Public Service Employees Union and Ontario Public Service Staff Union (Respondents) (*Dismissed*)

2618-95-U: Hospitality & Service Trades Union, Local 261 (Applicant) v. Holiday Inn Ottawa Centre (Market Square) (Respondent) (Withdrawn)

2665-95-U: Catherine Marie Silva (Applicant) v. London District Service Workers' Union, Local 220 (Respondent) (Withdrawn)

2719-95-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Touram Inc. (c.o.b. as Air Canada Vacations) (Respondent) (Withdrawn)

2725-95-U: 802824 Ontario Limited c.o.b. Estate Scope Planning (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) (Withdrawn)

2732-95-U: Vince Minichiello (Applicant) v. Amalgamated Transit Union, Local 113 (Respondent) v. Toronto Transit Commission (Intervener) (Withdrawn)

2742-95-U: Georgina Stavro (Applicant) v. Office and Professional Employees International Union, Local 343, United Food and Commercial Workers International Union, Local 1000A (Respondents) (Withdrawn)

2759-95-U: Arthur Julius (Applicant) v. Andy Sebhatu (Security Guard - Wm. Neilson), William Neilson Ltd. (Respondents) (Withdrawn)

2773-95-U: Union of Needletrades, Industrial and Textile Employees (UNITE) (Formerly International Ladies' Garment Workers' Union [ILGWU]) (Applicant) v. Pantorama Industries Inc. (Respondent) (Withdrawn)

2964-95-U: Ontario Sheet Metal Workers' & Roofers' Conference; Sheet Metal Workers' International Association (Applicant) v. #362262 Ontario Limited, c.o.b. as Baden Sheet Metal (Respondent) (*Withdrawn*)

2985-95-U: Communications, Energy and Paperworkers Union of Canada Local 87-M (Applicant) v. Toronto Real Estate Board (Respondent) (Withdrawn)

3013-95-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. D. Millman Market Services Inc. (Respondent) (*Withdrawn*)

3027-95-U: Barbara J. Westropp (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Dismissed*)

3028-95-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Atlantic Packaging Products Ltd. (Respondent) (*Withdrawn*)

3032-95-U: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Bedford Construction Inc. (Respondent) (*Withdrawn*)

3040-95-U: Tony Pe (Applicant) v. Delta Chelsea Inn, Hotel Employees Restaurant Employees Union, Local 75 (Respondents) (*Dismissed*)

3059-95-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Kardam Manufacturing Ltd. (Respondent) (*Withdrawn*)

3067-95-U: United Brotherhood of Carpenters and Joiners of America Local 1072 on its own behalf and on behalf of its member Vinayagamoorthy Nannithamby (Applicant) v. Jones Wood Industries Inc. (Respondent) (*Withdrawn*)

3107-95-U: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Oxford Child and Youth Centre (Respondent) (*Withdrawn*)

3153-95-U: Getahun Negash (Applicant) v. Union Local 75 (Respondent) (Withdrawn)

3158-95-U: Labourers' International Union of North America, Local 506 (Applicant) v. Teperman and Sons Inc. (Respondent) (*Endorsed Settlement*)

3175-95-U: Textile Processors, Service Trades Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Kannco Inc. c.o.b. as Modern Cleaners and Launderers (Respondent) (Withdrawn)

3187-95-U: United Food and Commercial Workers Union, Local 175/633 (Applicant) v. R. Fiedler Meat Products Ltd. and 832038 Ontario Ltd. c.o.b. as Fiedler Meat Products (1991) (Respondents) (Endorsed Settlement)

3208-95-U: Iris Spence (Applicant) v. Christian Labour Association of Canada and, Holland Christian Homes Inc. (Respondents) (*Dismissed*)

3222-95-U: Roman Horodecky (Applicant) v. R W Canada and Alantic & Pacific Co. of Canada (Respondents) (Dismissed)

3288-95-U: Canadian Union of Operating Engineers and General Workers (Applicant) v. International Union of Operating Engineers, Local 793 and Robert McQueen (Respondents) (*Withdrawn*)

3322-95-U: Manuel Botelho (Applicant) v. Crosby Group of Canada (Respondent) (Dismissed)

3335-95-U: Bret Patriquin (Applicant) v. Canadian Union of Public Employees (Respondent) (Dismissed)

APPLICATION FOR INTERIM ORDER

3001-95-M: Greater Ottawa Truckers Association on behalf of its members; and Lloyd Griffith; Henry Benoit; Willard Hayes; and Ron Deavy (Applicant) v. Teamsters Local Union 91 and Castor Dispatch Services Ltd. (Respondents) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

3124-95-M: The Canadian Linen Supply Co. Ltd. of The City of Windsor, Ontario (Applicant) v. Textile Processors, Service Trades, Health Care Professional and Technical Employees International Union, Local 351 (Respondent) (*Granted*)

JURISDICTIONAL DISPUTES

2206-91-JD: Labourers' International Union of North America, Local 247 (Applicant) v. 634272 Ontario Ltd. carrying on business under the firm name and style as Ross Construction Services and United Brotherhood of Carpenters and Joiners of America, Local 1988 (Respondents) (*Withdrawn*)

3415-94-JD: Electrical Power Systems Construction Association and Ontario Hydro (Applicants) v. International Brotherhood of Electrical Workers Local 1788, Labourers' International Union of North America, Local 1059 (Respondents) (*Granted*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

4402-94-M: IWA Canada Local 1-1000 (Applicant) v. Madawaska Hardwood Flooring Inc. (Respondent) (*Dismissed*)

1806-95-M: Ontario Public Service Employees Union (Applicant) v. Hotel-Dieu Grace Hospital (Respondent) (Withdrawn)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1245-95-OH: Winston McKnight (Applicant) v. Keystone Generator and Starter Rebuilders Limited (Respondent) (*Dismissed*)

1505-95-OH: Gary Burns (Applicant) v. MLG Enterprises Limited (Respondent) (Granted)

3068-95-OH: United Brotherhood of Carpenters and Joiners of America Local 1072 on its own behalf and on behalf of its member Vinayagamoorthy Nannithamby (Applicant) v. Jones Wood Industries Inc. (Respondent) (*Withdrawn*)

3218-95-OH: Terry M. Lundrigan (Applicant) v. Schering Plough HealthCare Products Canada Inc. (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE ENVIRONMENTAL PROTECTION ACT

4246-94-EP: Mr. Vince de Paepe (Applicant) v. Hydra-Dyne Industrial Cleaning (Respondent) (Dismissed)

1504-95-EP: Gary Burns (Applicant) v. MLG Enterprises Limited (Respondent) (Granted)

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

4254-94-M: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario (as represented by Management Board of Cabinet (Respondent) (*Granted*)

0217-95-M: The Crown in Right of Ontario Represented by Management Board of Cabinet (Applicant) v. Ontario Public Service Employees Union Operational and Maintenance Bargaining Unit (Respondent) (*Granted*)

CONSTRUCTION INDUSTRY GRIEVANCES

2933-90-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Montgomery KONE Elevator Company (Respondent) (*Granted*)

0561-92-G; **1996-93-G**: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Allied Architectural Systems Ltd. (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council (Intervener); International Association of Bridge, Structural and Ornamental Iron Workers, Local 765 (Applicant) v. Allied Architectural Systems Ltd. (Respondent) (*Withdrawn*)

3451-94-G; **3452-94-G**: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Redan Drywall Inc., Keyon Dry Wall Inc. (Respondents) (Endorsed Settlement)

0802-95-G; **1054-95-G**; **1060-95-G**: International Union of Bricklayers & Allied Craftsmen, Local 12 (Applicant) v. George and Asmussen Limited (Respondent); The International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. George & Asmussen Limited (Respondent) (*Endorsed Settlement*)

0955-95-G; **3095-95-G**: Teamsters Local Union No. 230 affiliated with the International Brotherhood of Teamsters (Applicant) v. Royal Excavating and Grading Limited (Respondent) (*Endorsed Settlement*)

1025-95-G: The International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. Zorgo Construction Ltd. (Respondent) (*Withdrawn*)

1028-95-G: The International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. DeLuca & Mascarin Masonry Contractors Ltd. (Respondent) (*Withdrawn*)

1031-95-G: The International Union of Bricklayers and Allied Craftsmen, Local 1 (Applicant) v. Samlar Construction & Masonry (Respondent) (*Withdrawn*)

1033-95-G: The International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. B.C. Masonry (Respondent) (Withdrawn)

1036-95-G: The International Union of Bricklayers and Allied Craftsmen, Local 1 (Applicant) v. Vinmod Construction Inc. (Respondent) (Withdrawn)

1044-95-G: The International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. Fervi Masonry (Respondent) (Withdrawn)

1052-95-G: International Union of Bricklayers and Allied Craftsmen, Local 1 (Applicant) v. Comin Masonry Limited (Respondent) (*Withdrawn*)

1053-95-G: The International Union of Bricklayers and Allied Craftsmen, Local 28 (Applicant) v. D. & D. Masonry (Respondent) (*Withdrawn*)

1056-95-G: The International Union of Bricklayers and Allied Craftsmen, Local 28 (Applicant) v. LTA Masonry Ltd. (Respondent) (Withdrawn)

1057-95-G: The International Union of Bricklayers and Allied Craftsmen, Local 4 (Applicant) v. Q-Tech Limited (Respondent) (*Withdrawn*)

1059-95-G: International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. Cruz Construction & Renovation (Respondent) (Withdrawn)

1061-95-G: The International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. Appleby Masonry General Contracting (Respondent) (Withdrawn)

1397-95-G: Ontario Allied Construction Trades Council on its own behalf and on behalf of United Brother-hood of Carpenters and Joiners of America, Local 18 (Applicant) v. Ontario Hydro and Electrical Power Systems Construction Association (Respondents) (Withdrawn)

1647-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Granville Constructors Ltd. (Respondent) (*Terminated*)

1713-95-G; 2203-95-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Panton Peel Carpet Services (Respondent); Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. N.C.S. Carpet Ltd. (Respondent) (Endorsed Settlement)

1727-95-G; 1824-95-G: United Brotherhood of Carpenters and Joiners of America, Locals 2222, 2451 and 2050 (Applicant) v. Ellis-Don Limited, Ellis-Don Construction Limited, Ellis-Don Forming Limited, Ellis-Don Construction Ltd., B & D Support Services Inc. (Respondents); Labourers' International Union of North America, Locals 1059 & 1081 (Applicant) v. Ellis-Don Limited, Ellis-Don Construction Limited, Ellis-Don Forming Limited, Ellis-Don Construction Ltd. and B & D Support Services Inc. (Respondents) (Withdrawn)

1767-95-G; 2794-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. 1104757 Ontario Ltd. (Respondent) (*Granted*)

1946-95-G: Sheet Metal Workers' International Association, Local 269 (Applicant) v. Robert Laframboise Mechanical Ltd. (Respondent) (Withdrawn)

2075-95-G: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Cadillac Fairview Corporation Limited (Respondent) (Endorsed Settlement)

2342-95-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. APCI Communications Inc. (Respondent) (Endorsed Settlement)

2418-95-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Local 463 (Applicant) v. James Johnston Mechanical Contracting Ltd. (Respondent); United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of The United States and Canada, and its Local 46 (Applicant) v. James Johnston Mechanical Contracting Ltd. (Respondent) (*Withdrawn*)

2638-95-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Clima Mechanical Contractors Limited (Respondent) (Endorsed Settlement)

2683-95-G: International Union of Operating Engineers, Local 793 (Applicant) v. Dibblee Construction Limited (Respondent) (Withdrawn)

2751-95-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ragno Excavating Limited (Respondent) (Endorsed Settlement)

2785-95-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. 913344 Ontario Limited c.o.b. BGI Systems Intergration (Respondent) (*Endorsed Settlement*)

2899-95-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sera Construction Ltd. (Respondent) (Endorsed Settlement)

- **2913-95-G:** United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Delsan Demolition Limited (Respondent) (*Withdrawn*)
- **2914-95-G**; **2915-95-G**: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. RBW Group (Respondent); International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Bennett & Wright Limited (RBW Group) (Respondent) (Endorsed Settlement)
- 2924-95-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. K.C. Steel Reinforcing Ltd. (Respondent) (Withdrawn)
- **2998-95-G:** International Union of Bricklayers and Allied Craftsmen, Local 20 (Applicant) v. Sweeting Masonry Limited (Respondent) (*Withdrawn*)
- **3112-95-G:** Labourers' International Union of North America, Local 506 (Applicant) v. Teperman and Sons Inc. (Respondent) (*Endorsed Settlement*)
- **3139-95-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Beltem Contracting Inc. (Respondent) (*Endorsed Settlement*)
- **3142-95-G:** International Union of Bricklayers and Allied Craftsmen Local 28 Ontario (Applicant) v. A. Corsi Masonry (Respondent) (*Granted*)
- **3148-95-G:** Labourers' International Union of North America, Local 183 (Applicant) v. York Concrete Forming (Respondent) (*Endorsed Settlement*)
- **3174-95-G:** International Brotherhood of Electrical Workers' Union, Local 353 (Applicant) v. Davy Sheafer Townsend Ltd. (Respondent) (*Withdrawn*)
- 3178-95-G; 3206-95-G: International Brotherhood of Painters and Allied Trades, and the Ontario Council of the International Brotherhood of Painters and Allied Trades, Glaziers Local 1819 (Applicant) v. Castle Craft Corporation (Respondent); International Brotherhood of Painters and Allied Trades, and the Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1832 (Applicant) v. Castle Craft Corporation (Respondent) (Endorsed Settlement)
- **3209-95-G:** International Union of Bricklayers and Allied Craftsmen Local #4 Ontario (Applicant) v. Q Tech Limited (Respondent) (Endorsed Settlement)
- **3210-95-G:** International Union of Bricklayers & Allied Craftsmen, Local 6, Windsor (Applicant) v. Colautti Brothers Tile & Carpet Inc. (Respondent) (Endorsed Settlement)
- **3278-95-G:** International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. G. Lacasse Electric (Respondent) (Endorsed Settlement)
- **3282-95-G:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Raymond Steel Ltd. (Respondent) (*Granted*)
- **3287-95-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Pacific Construction Inc. (Respondent) (*Endorsed Settlement*)
- **3290-95-G:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Q-Tech Limited (Respondent) (*Granted*)
- **3315-95-G:** United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Cambareri Construction Inc. (Respondent) (*Endorsed Settlement*)
- **3316-95-G:** United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Larolam Construction Inc. (Respondent) (*Withdrawn*)

- **3319-95-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Tor Mar Masonry Inc. (Respondent) (*Granted*)
- 3328-95-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Omega Electric Limited (Respondent) (Withdrawn)
- 3332-95-G: International Union of Operating Engineers, Local 793 (Applicant) v. Sharon Advertising & Research of Canada Limited c.o.b. AMF All Seasons Excavating (Respondent) (*Granted*)
- **3352-95-G:** Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 918070 Ontario Limited; Baseform Construction Ltd. (Respondent) (*Withdrawn*)
- **3358-95-G:** United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Care Drywall (Respondent) (*Granted*)
- **3363-95-G:** Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Brooms Mechanical Contracting Ltd. (Respondent) (Endorsed Settlement)
- 3390-95-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Unistar Forming Ltd. (Respondent) (Endorsed Settlement)
- **3407-95-G:** The Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1671 (Applicant) v. Favot Contracting Ltd. (Respondent) (*Withdrawn*)
- **3411-95-G:** Labourers' International Union of North America, Local 1089 (Applicant) v. 799316 Ontario Inc., c.o.b. as Concrete Systems (Respondent) (*Endorsed Settlement*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

- **2865-92-U:** William Hill Jr. (Applicant) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 938 (Respondent) (*Denied*)
- **0608-94-U:** Champuben Patel (Applicant) v. Amalgamated Clothing and Textile Workers Union, Local 551, CLC, AFL-CIO and Levi Strauss & Co. (Canada) Inc. (Respondents) (*Dismissed*)
- **2540-94-R:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. PCO Services Inc. (Respondent) v. Michael A. Rankin, All Technicians Against Unionization (Interveners) (*Granted*)
- 3016-94-U: William MacDonald and Edward Kennedy (Applicant) v. United Brotherhood of Carpenters and Joiners of America Local 249 (Respondent) (Dismissed)
- **0447-95-R:** Paul Beaulieu (Applicant) v. International Association of Heat and Frost Insulators and Asbestos Workers, and the International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Respondent) v. Adam's Industrial Insulations Ltd. (Intervener) (*Dismissed*)











Ontario Labour Relations Board, 400 University Avenue, Toronto, Ontario M7A 1V4







ONTARIO LABOUR RELATIONS BOARD REPORTS

February 1996



ONTARIO LABOUR RELATIONS BOARD

Chair Alternate Chair Vice-Chair

R.O. MacDOWELL. R.J. HERMAN C.J. ALBERTYN M. BENDEL J.B. BLOCH P. CHAPMAN

N.V. DISSANAYAKE

D. GEE

L. DAVIE

R.G. GOODFELLOW

B. HERLICH D.L. HEWAT R.D. HOWE M.K. JOACHIM J. JOHNSTON B. KELLER P. KNOPF J. KOVACS S. LIANG G. MISRA M.A. NAIRN K. O'NEIL. K. PETRYSHEN N.B. SATTERFIELD L. SHOULDICE I.M. STAMP R. STOYKEWYCH G. SURDYKOWSKI L. TRACHUK

Members

K. WHITAKER

B.L. ARMSTRONG K.S. BRENNAN A.R. FOUCAULT W.N. FRASER P.V. GRASSO V. HARRIS J. IRVINE J. KENNEDY S. LAING C. McDONALD O.R. McGUIRE G. McMENEMY R.R. MONTAGUE D.A. PATTERSON H. PEACOCK

R.W. PIRRIE F.B. REAUME J. REDSHAW J.A. RONSON J.A. RUNDLE D. RYAN P. SEVILLE R.M. SLOAN M. SULLIVAN J. TRIM

M. VUKOBRAT R. WEISS

W.H. WIGHTMAN D.G. WOZNIAK

Registrar **Board Solicitors**

T.A. INNISS K. HESHKA R. LEBI

K.A. MacDONALD

ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the Ontario Labour Relations Board

Cited [1996] OLRB REP. FEBRUARY

EDITOR: RON LEBI

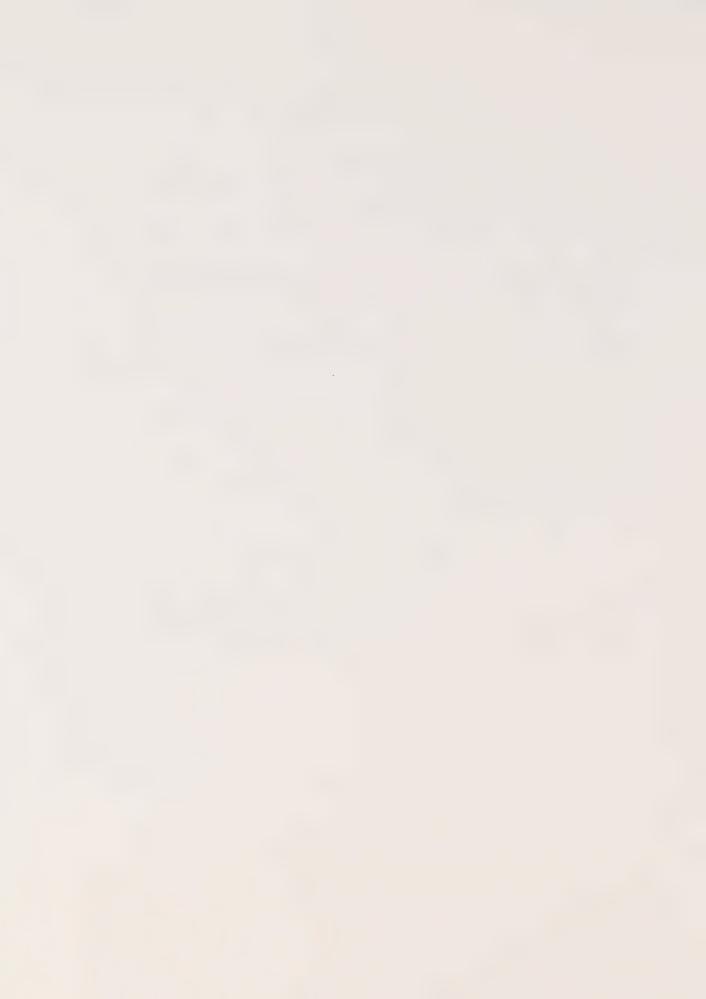
Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.





CASES REPORTED

1.	Dobben Group Inc., Dobben Construction Inc. and Marcon Contractors; Re Carpenters and Allied Workers Local 27, CJA, Locals 785 and 2050	57
2.	Erin Park Automotive Limited; Re National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW-Canada)	64
3.	Ferretti Forming Inc., Fer-Pal Construction Ltd.; Re IUOE, Local 793; Re LIUNA, Local 183	66
4.	IBEW; Re IBEW Local 1788; Re The IBEW Electrical Power Systems Construction Council of Ontario and IBEW, Local Unions 105, 115, 120, 303, 402, 530, 586, 773, 804, 894, 1687 and 1739; EPSCA and Ontario Hydro; IBEW, Local 353	70
5.	Magnum Glass Inc., Magnum Associates Ltd., Magnum Glass Installations Ltd., Hardie Glass & Aluminum Inc.; Re International Brotherhood of Painters and Allied Trades and The Ontario Council of International Brotherhood of Painters and Allied Trades	95
6.	Ontario Public Services Employees Union; Pauline Stoddart	98
7.	Robert M. Heenan Sales Ltd., and Robert M. Heenan, Vic Murai Holdings Ltd. Vic Murai; Re UFCW, Local 175	106
8.	Robert M. Heenan Sales Ltd.; Re UFCW; Re Group of Employees	153
9.	Winter, James Dr.; Re The Faculty Association of the University of Windsor; Re The University of Windsor	154
10.	Zentil Plumbing & Heating Contracting Ltd.; UA, Local Union 46	178
	COURT PROCEEDINGS	
1.	Weston Abattoir Ltd., Barron Poultry Limited, Morrison Meat Packers Limited, Belwood Poultry Ltd. and The Ontario Independent Meat Packers and Processors Society; Re OPSEU, The Crown in Right of Ontario Represented by Management Board of Cabinet - Administrative Unit and The OLRB.	181



SUBJECT INDEX

Alteration of Jurisdiction - Construction Industry - Parties - Practice and Procedure - Unfair Labour Practice - IBEW Local ("Local 1788") alleging that IBEW (the "International") altering its jurisdiction without just cause contrary to Bill 80 amendments to the Act - Board granting standing to IBEW Electrical Power Systems Construction Council of Ontario, various locals of IBEW, EPSCA, and Ontario Hydro and denying standing to IBEW Construction Council of Ontario and to Electrical Contractors Association of Ontario - Board directing applicant Local 1788 to call its evidence first - On the merits, Board determining that International had altered Local 1788's jurisdiction as alleged, but that it had just cause to do so - Board satisfied that alteration of jurisdiction likely to facilitate viable and stable collective bargaining without causing serious labour relations problems - Application dismissed	
IBEW; RE IBEW LOCAL 1788; RE THE IBEW ELECTRICAL POWER SYSTEMS CONSTRUCTION COUNCIL OF ONTARIO AND IBEW, LOCAL UNIONS 105, 115, 120, 303, 402, 530, 586, 773, 804, 894, 1687 AND 1739; EPSCA AND ONTARIO HYDRO; IBEW, LOCAL 353	
Arbitration - Construction Industry - Construction Industry Grievance - Grievance delivered to employer and referred to arbitration well beyond time limits contained in collective agreement - While union offering explanation for delay in filing grievance, no explanation given for 8 1/2 month delay in referring grievance to arbitration - Board not satisfied that reasonable grounds existing to extend time limits in collective agreement - Grievance dismissed ZENTIL PLUMBING & HEATING CONTRACTING LTD.; UA, LOCAL UNION 46	

Bargaining Rights - Certification - Construction Industry - Practice and Procedure - Sale of a Business - Related Employer - Responding employer asking Board to bar union's sale of a business and related employer applications filed while certification application pending in connection with same employer - Employer's request dismissed

MAGNUM GLASS INC., MAGNUM ASSOCIATES LTD., MAGNUM GLASS INSTALLATIONS LTD., HARDIE GLASS & ALUMINUM INC.; RE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES AND THE ONTARIO COUNCIL OF INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES.....

Certification - Bargaining Rights - Construction Industry - Practice and Procedure - Sale of a Business - Related Employer - Responding employer asking Board to bar union's sale of a business and related employer applications filed while certification application pending in connection with same employer - Employer's request dismissed

MAGNUM GLASS INC., MAGNUM ASSOCIATES LTD., MAGNUM GLASS INSTALLATIONS LTD., HARDIE GLASS & ALUMINUM INC.; RE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES AND THE ONTARIO COUNCIL OF INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES.

Certification - Contempt - Employer Support - Evidence - Membership Evidence - Practice and Procedure - Board rejecting various motions, objections, allegations, requests and submissions made by employer and objecting employees, including objection to composition of the panel, submission that Board without jurisdiction to schedule certification application to be heard on consecutive day basis, allegations of abuse of process and of discrimination made against union, request that Board refuse to entertain application pursuant to section 105(2)(i) of the Act, objection to propriety of Form A-4 and to membership evidence filed

178

70

95

95

by the union, and allegation of employer support for application contrary to section 13 of the Act - Certificate issuing - Board also critical of conduct of objecting employees' counsel and employer's counsel - Counsels' conduct throughout proceeding described as rude, interruptive, and intentionally disrespectful to tribunal - Counsel directed to attend before the Board to show cause why Board ought not to state case of contempt to Divisional Court or report counsels' conduct to Law Society of Upper Canada	
ROBERT M. HEENAN SALES LTD., AND ROBERT M. HEENAN, VIC MURAI HOLDINGS LTD. VIC MURAI; RE UFCW, LOCAL 175	106
Certification - Contempt - Practice and Procedure - Board, in earlier decision, critical of conduct of objecting employees' counsel and employer's counsel - Counsel, in earlier decision, directed to attend before Board to show cause why Board ought not to state case of contempt to Divisional Court or report counsels' conduct to Law Society of Upper Canada - Counsel submitting letters of apology prior to show cause hearing - Board accepting counsels' apologies but not explanations or justifications offered for their conduct - Board concluding that show cause hearing unnecessary - Proceeding terminated	
ROBERT M. HEENAN SALES LTD.; RE UFCW; RE GROUP OF EMPLOYEES	153
Construction Industry - Alteration of Jurisdiction - Parties - Practice and Procedure - Unfair Labour Practice - IBEW Local ("Local 1788") alleging that IBEW (the "International") altering its jurisdiction without just cause contrary to Bill 80 amendments to the Act - Board granting standing to IBEW Electrical Power Systems Construction Council of Ontario, various locals of IBEW, EPSCA, and Ontario Hydro and denying standing to IBEW Construction Council of Ontario and to Electrical Contractors Association of Ontario - Board directing applicant Local 1788 to call its evidence first - On the merits, Board determining that International had altered Local 1788's jurisdiction as alleged, but that it had just cause to do so - Board satisfied that alteration of jurisdiction likely to facilitate viable and stable collective bargaining without causing serious labour relations problems - Application dismissed	
IBEW; RE IBEW LOCAL 1788; RE THE IBEW ELECTRICAL POWER SYSTEMS CONSTRUCTION COUNCIL OF ONTARIO AND IBEW, LOCAL UNIONS 105, 115, 120, 303, 402, 530, 586, 773, 804, 894, 1687 AND 1739; EPSCA AND ONTARIO HYDRO; IBEW, LOCAL 353	70
Construction Industry - Arbitration - Construction Industry Grievance - Grievance delivered to employer and referred to arbitration well beyond time limits contained in collective agreement - While union offering explanation for delay in filing grievance, no explanation given for 8 1/2 month delay in referring grievance to arbitration - Board not satisfied that reasonable grounds existing to extend time limits in collective agreement - Grievance dismissed	
ZENTIL PLUMBING & HEATING CONTRACTING LTD.; UA, LOCAL UNION 46	178
Construction Industry - Bargaining Rights - Certification - Practice and Procedure - Sale of a Business - Related Employer - Responding employer asking Board to bar union's sale of a business and related employer applications filed while certification application pending in connection with same employer - Employer's request dismissed	
MAGNUM GLASS INC., MAGNUM ASSOCIATES LTD., MAGNUM GLASS INSTALLATIONS LTD., HARDIE GLASS & ALUMINUM INC.; RE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES AND THE ONTARIO COUNCIL OF INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES	95
Construction Industry - Related Employer - Board Companies A and B conceding that pre-conditions to granting section 1(4) relief present, but submitting that Board ought to exercise discretion against making single employer declaration - Board finding it inappropriate to grant	-,3

66

178

106

section 1(4) relief for various reasons, including fact that Company A was incorporated before Company B, each entity performed its owns type of work, there was no common pool or interchange of employees, the companies had been used in a way that had not compromised the union's bargaining rights and the union had represented at the time collective agreement was entered into that it would have no impact on Company A - Application dismissed

FERRETTI FORMING INC., FER-PAL CONSTRUCTION LTD.; RE IUOE, LOCAL 793; RE LIUNA, LOCAL 183

Construction Industry Grievance - Arbitration - Construction Industry - Grievance delivered to employer and referred to arbitration well beyond time limits contained in collective agreement - While union offering explanation for delay in filing grievance, no explanation given for 8 1/2 month delay in referring grievance to arbitration - Board not satisfied that reasonable grounds existing to extend time limits in collective agreement - Grievance dismissed

ZENTIL PLUMBING & HEATING CONTRACTING LTD.; UA, LOCAL UNION 46..

Contempt - Certification - Employer Support - Evidence - Membership Evidence - Practice and Procedure - Board rejecting various motions, objections, allegations, requests and submissions made by employer and objecting employees, including objection to composition of the panel, submission that Board without jurisdiction to schedule certification application to be heard on consecutive day basis, allegations of abuse of process and of discrimination made against union, request that Board refuse to entertain application pursuant to section 105(2)(i) of the Act, objection to propriety of Form A-4 and to membership evidence filed by the union, and allegation of employer support for application contrary to section 13 of the Act - Certificate issuing - Board also critical of conduct of objecting employees' counsel and employer's counsel - Counsels' conduct throughout proceeding described as rude, interruptive, and intentionally disrespectful to tribunal - Counsel directed to attend before the Board to show cause why Board ought not to state case of contempt to Divisional Court or report counsels' conduct to Law Society of Upper Canada

ROBERT M. HEENAN SALES LTD., AND ROBERT M. HEENAN, VIC MURAI HOLDINGS LTD. VIC MURAI; RE UFCW, LOCAL 175.....

Contempt - Certification - Practice and Procedure - Board, in earlier decision, critical of conduct of objecting employees' counsel and employer's counsel - Counsel, in earlier decision, directed to attend before Board to show cause why Board ought not to state case of contempt to Divisional Court or report counsels' conduct to Law Society of Upper Canada - Counsel submitting letters of apology prior to show cause hearing - Board accepting counsels' apologies but not explanations or justifications offered for their conduct - Board concluding that show cause hearing unnecessary - Proceeding terminated

ROBERT M. HEENAN SALES LTD.; RE UFCW; RE GROUP OF EMPLOYEES...... 153

Crown Employees Collective Bargaining Act - Essential Services Agreement - Judicial Review Natural Justice - Board designating 26 Meat Inspectors as essential but only in order to monitor that no illegal slaughter of animals taking place - Board's order effectively shutting down slaughtering operations at provincially licensed premises - Various meat packers and processors seeking expedited judicial review before single judge on basis of urgency under section 6(2) of Judicial Review Procedure Act (JRPA) - Meat packers alleging that Board's decision patently unreasonable and that failure of Board to give notice to meat packers of

Board's proceeding constituting denial of natural justice - Court granting leave to hear application under section 6(2) of JRPA, but dismissing application WESTON ABATTOIR LTD., BARRON POULTRY LIMITED, MORRISON MEAT PACKERS LIMITED, BELWOOD POULTRY LTD. AND THE ONTARIO INDE-PENDENT MEAT PACKERS AND PROCESSORS SOCIETY; RE OPSEU, THE CROWN IN RIGHT OF ONTARIO REPRESENTED BY MANAGEMENT BOARD OF CABINET - ADMINISTRATIVE UNIT AND THE OLRB..... 181 Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Applicant claiming that faculty union violated duty of fair representation when it refused to take his grievance to arbitration - Union's non-suit motion allowed - Application dismissed WINTER, JAMES DR.; RE THE FACULTY ASSOCIATION OF THE UNIVERSITY OF WINDSOR; RE THE UNIVERSITY OF WINDSOR 154 Employer Support - Certification - Contempt - Evidence - Membership Evidence - Practice and Procedure - Board rejecting various motions, objections, allegations, requests and submissions made by employer and objecting employees, including objection to composition of the panel, submission that Board without jurisdiction to schedule certification application to be heard on consecutive day basis, allegations of abuse of process and of discrimination made against union, request that Board refuse to entertain application pursuant to section 105(2)(i) of the Act, objection to propriety of Form A-4 and to membership evidence filed by the union, and allegation of employer support for application contrary to section 13 of the Act - Certificate issuing - Board also critical of conduct of objecting employees' counsel and employer's counsel - Counsels' conduct throughout proceeding described as rude, interruptive, and intentionally disrespectful to tribunal - Counsel directed to attend before the Board to show cause why Board ought not to state case of contempt to Divisional Court or report counsels' conduct to Law Society of Upper Canada ROBERT M. HEENAN SALES LTD., AND ROBERT M. HEENAN, VIC MURAI HOLDINGS LTD. VIC MURAI; RE UFCW, LOCAL 175..... 106 Essential Services Agreement - Crown Employees Collective Bargaining Act - Judicial Review -Natural Justice - Board designating 26 Meat Inspectors as essential but only in order to monitor that no illegal slaughter of animals taking place - Board's order effectively shutting down slaughtering operations at provincially licensed premises - Various meat packers and processors seeking expedited judicial review before single judge on basis of urgency under section 6(2) of Judicial Review Procedure Act (JRPA) - Meat packers alleging that Board's decision patently unreasonable and that failure of Board to give notice to meat packers of Board's proceeding constituting denial of natural justice - Court granting leave to hear application under section 6(2) of JRPA, but dismissing application WESTON ABATTOIR LTD., BARRON POULTRY LIMITED, MORRISON MEAT PACKERS LIMITED, BELWOOD POULTRY LTD. AND THE ONTARIO INDE-PENDENT MEAT PACKERS AND PROCESSORS SOCIETY; RE OPSEU, THE CROWN IN RIGHT OF ONTARIO REPRESENTED BY MANAGEMENT BOARD OF CABINET - ADMINISTRATIVE UNIT AND THE OLRB..... 181

Evidence - Certification - Contempt - Employer Support - Membership Evidence - Practice and Procedure - Board rejecting various motions, objections, allegations, requests and submissions made by employer and objecting employees, including objection to composition of the panel, submission that Board without jurisdiction to schedule certification application to be heard on consecutive day basis, allegations of abuse of process and of discrimination made against union, request that Board refuse to entertain application pursuant to section 105(2)(i) of the Act, objection to propriety of Form A-4 and to membership evidence filed by the union, and allegation of employer support for application contrary to section 13 of the Act - Certificate issuing - Board also critical of conduct of objecting employees' counsel

and employer's counsel - Counsels' conduct throughout proceeding described as rude, interruptive, and intentionally disrespectful to tribunal - Counsel directed to attend before the Board to show cause why Board ought not to state case of contempt to Divisional Court or report counsels' conduct to Law Society of Upper Canada

ROBERT M. HEENAN SALES LTD., AND ROBERT M. HEENAN, VIC MURAI HOLDINGS LTD. VIC MURAI; RE UFCW, LOCAL 175.....

106

Judicial Review - Crown Employees Collective Bargaining Act - Essential Services Agreement - Natural Justice - Board designating 26 Meat Inspectors as essential but only in order to monitor that no illegal slaughter of animals taking place - Board's order effectively shutting down slaughtering operations at provincially licensed premises - Various meat packers and processors seeking expedited judicial review before single judge on basis of urgency under section 6(2) of Judicial Review Procedure Act (JRPA) - Meat packers alleging that Board's decision patently unreasonable and that failure of Board to give notice to meat packers of Board's proceeding constituting denial of natural justice - Court granting leave to hear application under section 6(2) of JRPA, but dismissing application

WESTON ABATTOIR LTD., BARRON POULTRY LIMITED, MORRISON MEAT PACKERS LIMITED, BELWOOD POULTRY LTD. AND THE ONTARIO INDEPENDENT MEAT PACKERS AND PROCESSORS SOCIETY; RE OPSEU, THE CROWN IN RIGHT OF ONTARIO REPRESENTED BY MANAGEMENT BOARD OF CABINET - ADMINISTRATIVE UNIT AND THE OLRB......

181

Membership Evidence - Certification - Contempt - Employer Support - Evidence - Practice and Procedure - Board rejecting various motions, objections, allegations, requests and submissions made by employer and objecting employees, including objection to composition of the panel, submission that Board without jurisdiction to schedule certification application to be heard on consecutive day basis, allegations of abuse of process and of discrimination made against union, request that Board refuse to entertain application pursuant to section 105(2)(i) of the Act, objection to propriety of Form A-4 and to membership evidence filed by the union, and allegation of employer support for application contrary to section 13 of the Act - Certificate issuing - Board also critical of conduct of objecting employees' counsel and employer's counsel - Counsels' conduct throughout proceeding described as rude, interruptive, and intentionally disrespectful to tribunal - Counsel directed to attend before the Board to show cause why Board ought not to state case of contempt to Divisional Court or report counsels' conduct to Law Society of Upper Canada

ROBERT M. HEENAN SALES LTD., AND ROBERT M. HEENAN, VIC MURAI HOLDINGS LTD. VIC MURAI; RE UFCW, LOCAL 175.....

106

Natural Justice - Crown Employees Collective Bargaining Act - Essential Services Agreement - Judicial Review - Board designating 26 Meat Inspectors as essential but only in order to monitor that no illegal slaughter of animals taking place - Board's order effectively shutting down slaughtering operations at provincially licensed premises - Various meat packers and processors seeking expedited judicial review before single judge on basis of urgency under section 6(2) of Judicial Review Procedure Act (JRPA) - Meat packers alleging that Board's decision patently unreasonable and that failure of Board to give notice to meat packers of Board's proceeding constituting denial of natural justice - Court granting leave to hear application under section 6(2) of JRPA, but dismissing application

WESTON ABATTOIR LTD., BARRON POULTRY LIMITED, MORRISON MEAT PACKERS LIMITED, BELWOOD POULTRY LTD. AND THE ONTARIO INDEPENDENT MEAT PACKERS AND PROCESSORS SOCIETY; RE OPSEU, THE CROWN IN RIGHT OF ONTARIO REPRESENTED BY MANAGEMENT BOARD OF CABINET - ADMINISTRATIVE UNIT AND THE OLRB......

181

Labour Practice - IBEW Local ("Local 1788") alleging that IBEW (the "International") altering its jurisdiction without just cause contrary to Bill 80 amendments to the Act - Board granting standing to IBEW Electrical Power Systems Construction Council of Ontario, various locals of IBEW, EPSCA, and Ontario Hydro and denying standing to IBEW Construction Council of Ontario and to Electrical Contractors Association of Ontario - Board directing applicant Local 1788 to call its evidence first - On the merits, Board determining that International had altered Local 1788's jurisdiction as alleged, but that it had just cause to do so - Board satisfied that alteration of jurisdiction likely to facilitate viable and stable collective bargaining without causing serious labour relations problems - Application dismissed

IBEW; RE IBEW LOCAL 1788; RE THE IBEW ELECTRICAL POWER SYSTEMS CONSTRUCTION COUNCIL OF ONTARIO AND IBEW, LOCAL UNIONS 105, 115, 120, 303, 402, 530, 586, 773, 804, 894, 1687 AND 1739; EPSCA AND ONTARIO HYDRO; IBEW, LOCAL 353....

Practice and Procedure - Alteration of Jurisdiction - Construction Industry - Parties - Unfair Labour Practice - IBEW Local ("Local 1788") alleging that IBEW (the "International") altering its jurisdiction without just cause contrary to Bill 80 amendments to the Act - Board granting standing to IBEW Electrical Power Systems Construction Council of Ontario, various locals of IBEW, EPSCA, and Ontario Hydro and denying standing to IBEW Construction Council of Ontario and to Electrical Contractors Association of Ontario - Board directing applicant Local 1788 to call its evidence first - On the merits, Board determining that International had altered Local 1788's jurisdiction as alleged, but that it had just cause to do so - Board satisfied that alteration of jurisdiction likely to facilitate viable and stable collective bargaining without causing serious labour relations problems - Application dismissed

IBEW; RE IBEW LOCAL 1788; RE THE IBEW ELECTRICAL POWER SYSTEMS CONSTRUCTION COUNCIL OF ONTARIO AND IBEW, LOCAL UNIONS 105, 115, 120, 303, 402, 530, 586, 773, 804, 894, 1687 AND 1739; EPSCA AND ONTARIO HYDRO; IBEW, LOCAL 353.....

Practice and Procedure - Bargaining Rights - Certification - Construction Industry - Sale of a Business - Related Employer - Responding employer asking Board to bar union's sale of a business and related employer applications filed while certification application pending in connection with same employer - Employer's request dismissed

MAGNUM GLASS INC., MAGNUM ASSOCIATES LTD., MAGNUM GLASS INSTALLATIONS LTD., HARDIE GLASS & ALUMINUM INC.; RE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES AND THE ONTARIO COUNCIL OF INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES.

Practice and Procedure - Certification - Contempt - Employer Support - Evidence - Membership Evidence - Board rejecting various motions, objections, allegations, requests and submissions made by employer and objecting employees, including objection to composition of the panel, submission that Board without jurisdiction to schedule certification application to be heard on consecutive day basis, allegations of abuse of process and of discrimination made against union, request that Board refuse to entertain application pursuant to section 105(2)(i) of the Act, objection to propriety of Form A-4 and to membership evidence filed by the union, and allegation of employer support for application contrary to section 13 of the Act - Certificate issuing - Board also critical of conduct of objecting employees' counsel and employer's counsel - Counsels' conduct throughout proceeding described as rude, interruptive, and intentionally disrespectful to tribunal - Counsel directed to attend before

70

70

95

	the Board to show cause why Board ought not to state case of contempt to Divisional Court or report counsels' conduct to Law Society of Upper Canada	
	ROBERT M. HEENAN SALES LTD., AND ROBERT M. HEENAN, VIC MURAI HOLDINGS LTD. VIC MURAI; RE UFCW, LOCAL 175	106
1	ce and Procedure - Certification - Contempt - Board, in earlier decision, critical of conduct of objecting employees' counsel and employer's counsel - Counsel, in earlier decision, directed to attend before Board to show cause why Board ought not to state case of contempt to Divisional Court or report counsels' conduct to Law Society of Upper Canada - Counsel submitting letters of apology prior to show cause hearing - Board accepting counsels' apologies but not explanations or justifications offered for their conduct - Board concluding that show cause hearing unnecessary - Proceeding terminated	
	ROBERT M. HEENAN SALES LTD.; RE UFCW; RE GROUP OF EMPLOYEES	153
	ce and Procedure - Duty of Fair Representation - Unfair Labour Practice - Applicant claiming that faculty union violated duty of fair representation when it refused to take his grievance to arbitration - Union's non-suit motion allowed - Application dismissed	
	WINTER, JAMES DR.; RE THE FACULTY ASSOCIATION OF THE UNIVERSITY OF WINDSOR; RE THE UNIVERSITY OF WINDSOR	154
	ce and Procedure - Termination - Timeliness - Board presented with third termination application regarding same bargaining unit since August 1995 - First application withdrawn and second application dismissed after hearing and Board's conclusion that petition not proven to be voluntary - Board relieving against strict application of Interim Certification and Termination Rules and finding third application sent by registered mail before, but received after, appointment of conciliation officer to be timely - Board, however, exercising its discretion under section 111(2)(k) of the Act to refuse to entertain third application	
	ONTARIO PUBLIC SERVICES EMPLOYEES UNION; PAULINE STODDART	98
	ed Employer - Bargaining Rights - Certification - Construction Industry - Practice and Procedure - Sale of a Business - Responding employer asking Board to bar union's sale of a business and related employer applications filed while certification application pending in connection with same employer - Employer's request dismissed	
	MAGNUM GLASS INC., MAGNUM ASSOCIATES LTD., MAGNUM GLASS INSTALLATIONS LTD., HARDIE GLASS & ALUMINUM INC.; RE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES AND THE ONTARIO COUNCIL OF INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES.	95
	ed Employer - Construction Industry - Board Companies A and B conceding that pre-conditions to granting section 1(4) relief present, but submitting that Board ought to exercise discretion against making single employer declaration - Board finding it inappropriate to grant section 1(4) relief for various reasons, including fact that Company A was incorporated before Company B, each entity performed its owns type of work, there was no common pool or interchange of employees, the companies had been used in a way that had not compromised the union's bargaining rights and the union had represented at the time collective agreement was entered into that it would have no impact on Company A - Application dismissed	
	FERRETTI FORMING INC., FER-PAL CONSTRUCTION LTD.; RE IUOE, LOCAL 793; RE LIUNA, LOCAL 183	66
Relat	red Employer - Remedies - Responding companies found to be carrying on associated or related activities, even assuming that one of the companies engaged solely in excavation work while the others engaged in concrete forming work - Union asking for declaration to	

make all responding parties jointly liable for outstanding debts of one another - Board holding that section 1(4) relief appropriate to make related entities jointly liable for outstanding debts and to prevent union's bargaining rights from being eroded where work is continuing to be performed under collective agreement - Accordingly, Board declaring responding companies in first application to be jointly liable for outstanding debts owed to union - Board, however, exercising discretion against issuing single employer declaration in second application because Board not satisfied that related company performing or likely to perform work within scope of collective agreement - Declaration for sole purpose of providing union with "deep pocket" from which to recover outstanding debt not appropriate in such circumstances - Second application dismissed	
DOBBEN GROUP INC., DOBBEN CONSTRUCTION INC. AND MARCON CONTRACTORS; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, CJA, LOCALS 785 AND 2050	5
Remedies - Related Employer - Responding companies found to be carrying on associated or related activities, even assuming that one of the companies engaged solely in excavation work while the others engaged in concrete forming work - Union asking for declaration to make all responding parties jointly liable for outstanding debts of one another - Board holding that section 1(4) relief appropriate to make related entities jointly liable for outstanding debts and to prevent union's bargaining rights from being eroded where work is continuing to be performed under collective agreement - Accordingly, Board declaring responding companies in first application to be jointly liable for outstanding debts owed to union - Board, however, exercising discretion against issuing single employer declaration in second application because Board not satisfied that related company performing or likely to perform work within scope of collective agreement - Declaration for sole purpose of providing union with "deep pocket" from which to recover outstanding debt not appropriate in such circumstances - Second application dismissed	
DOBBEN GROUP INC., DOBBEN CONSTRUCTION INC. AND MARCON CONTRACTORS; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, CJA, LOCALS 785 AND 2050.	57
Sale of a Business - Bargaining Rights - Certification - Construction Industry - Practice and Procedure - Related Employer - Responding employer asking Board to bar union's sale of a business and related employer applications filed while certification application pending in connection with same employer - Employer's request dismissed	
MAGNUM GLASS INC., MAGNUM ASSOCIATES LTD., MAGNUM GLASS INSTALLATIONS LTD., HARDIE GLASS & ALUMINUM INC.; RE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES AND THE ONTARIO COUNCIL OF INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES	95
Fermination - Employer seeking to terminate union's bargaining rights for failure to bargain - No evidence that union's "sleeping on its rights" - Application dismissed for failure to disclose <i>prima facie</i> case	
ERIN PARK AUTOMOTIVE LIMITED; RE NATIONAL AUTOMOBILE, AERO- SPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)	64
	UT

Termination - Practice and Procedure - Timeliness - Board presented with third termination application regarding same bargaining unit since August 1995 - First application withdrawn and second application dismissed after hearing and Board's conclusion that petition not proven to be voluntary - Board relieving against strict application of Interim Certification and Termination Rules and finding third application sent by registered mail before, but

received after, appointment of conciliation officer to be timely - Board, however, exercising its discretion under section 111(2)(k) of the Act to refuse to entertain third application	
ONTARIO PUBLIC SERVICES EMPLOYEES UNION; PAULINE STODDART	98
Timeliness - Practice and Procedure - Termination - Board presented with third termination application regarding same bargaining unit since August 1995 - First application withdrawn and second application dismissed after hearing and Board's conclusion that petition not proven to be voluntary - Board relieving against strict application of Interim Certification and Termination Rules and finding third application sent by registered mail before, but received after, appointment of conciliation officer to be timely - Board, however, exercising its discretion under section 111(2)(k) of the Act to refuse to entertain third application	
ONTARIO PUBLIC SERVICES EMPLOYEES UNION; PAULINE STODDART	98
Unfair Labour Practice - Alteration of Jurisdiction - Construction Industry - Parties - Practice and Procedure - IBEW Local ("Local 1788") alleging that IBEW (the "International") altering its jurisdiction without just cause contrary to Bill 80 amendments to the Act - Board granting standing to IBEW Electrical Power Systems Construction Council of Ontario, various locals of IBEW, EPSCA, and Ontario Hydro and denying standing to IBEW Construction Council of Ontario and to Electrical Contractors Association of Ontario - Board directing applicant Local 1788 to call its evidence first - On the merits, Board determining that International had altered Local 1788's jurisdiction as alleged, but that it had just cause to do so-Board satisfied that alteration of jurisdiction likely to facilitate viable and stable collective bargaining without causing serious labour relations problems - Application dismissed	
IBEW; RE IBEW LOCAL 1788; RE THE IBEW ELECTRICAL POWER SYSTEMS CONSTRUCTION COUNCIL OF ONTARIO AND IBEW, LOCAL UNIONS 105, 115, 120, 303, 402, 530, 586, 773, 804, 894, 1687 AND 1739; EPSCA AND ONTARIO HYDRO; IBEW, LOCAL 353	70
Unfair Labour Practice - Duty of Fair Representation - Practice and Procedure - Applicant claiming that faculty union violated duty of fair representation when it refused to take his grievance to arbitration - Union's non-suit motion allowed - Application dismissed	
WINTER, JAMES DR.; RE THE FACULTY ASSOCIATION OF THE UNIVERSITY OF WINDSOR; RE THE UNIVERSITY OF WINDSOR	154



3372-94-R; 3373-94-G; 1164-95-G; 1165-95-R Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Locals 785 and 2050, Applicants v. Dobben Group Inc., Dobben Construction Inc. and Marcon Contractors, Responding Parties; Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, and United Brotherhood of Carpenters and Joiners of America, Locals 785 and 2050, Applicants v. The Dobben Group Inc., Responding Party; Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, and United Brotherhood of Carpenters and Joiners of America, Locals 785 and 2050, Applicants v. Con-Ex Inc., Responding Party; Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, and United Brotherhood of Carpenters and Joiners of America, and United Brotherhood of Carpenters and Joiners of America, and United Brotherhood of Carpenters and Joiners of America, Marcon Contractors Inc., and Con-Ex Inc., Responding Parties

Related Employer - Remedies - Responding companies found to be carrying on associated or related activities, even assuming that one of the companies engaged solely in excavation work while the others engaged in concrete forming work - Union asking for declaration to make all responding parties jointly liable for outstanding debts of one another - Board holding that section 1(4) relief appropriate to make related entities jointly liable for outstanding debts and to prevent union's bargaining rights from being eroded where work is continuing to be performed under collective agreement - Accordingly, Board declaring responding companies in first application to be jointly liable for outstanding debts owed to union - Board, however, exercising discretion against issuing single employer declaration in second application because Board not satisfied that related company performing or likely to perform work within scope of collective agreement - Declaration for sole purpose of providing union with "deep pocket" from which to recover outstanding debt not appropriate in such circumstances - Second application dismissed

BEFORE: D. L. Gee, Vice-Chair, and Board Members F. B. Reaume and G. McMenemy.

APPEARANCES: Mike McCreary, Carlos Pimental and Wensel Woeschka on behalf of the applicants; Bill Sinclair and Lucus Dobben on behalf of the responding parties.

DECISION OF THE BOARD; February 13, 1996

- 1. The style of cause is hereby amended to name the applicants in each of these Board Files as follows: "Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, and United Brotherhood of Carpenters and Joiners of America, Locals 785 and 2050".
- 2. Board File No. 3372-94-R is an application under what are now sections 69 and 1(4) of the *Labour Relations Act*, 1995 (the "Act"). By decision dated May 30, 1995 the Board declared Dobben Group Inc. ("Group"), Dobben Construction Inc. ("Dobben") and Marcon Contractors ("Marcon") (collectively referred to herein as the "Dobben group of companies") to constitute one employer for the purposes of the Act. The Board further declared that Group, Dobben and Marcon were all bound to the Provincial Collective Agreement between the Carpenters Employer Bargaining Agency and the Ontario Provincial Council, United Brotherhood of Carpenters and

Joiners of America (the "Carpenters' Provincial Agreement"). A request made by the applicants, that the Board declare Dobben and Marcon jointly liable for outstanding debts of Group owing to the United Brotherhood of Carpenters and Joiners of America, Local 2050 ("Local 2050") as a result of a Board order in Board File No. 2509-94-G and to the Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America ("Local 27") as a result of a Board order in Board File No. 3543-94-G, remains outstanding.

- 3. Board File No. 1165-95-R is a further application under sections 69 and 1(4) of the Act. The applicants seek a declaration under section 1(4) of the Act that Con-Ex Inc. ("Con-Ex") and the Dobben group of companies constitute one employer for the purposes of the Act and that Con-Ex is jointly liable for the outstanding debts of Group as identified in the previous paragraph. At the hearing, the applicants advised the Board that they were not pursuing their application under section 69.
- 4. Board File Nos. 1164-95-G and 3373-94-G are referrals of grievances to arbitration under what is now section 133 of the Act which have not yet been heard by the Board. These matters have been held in abeyance pending the outcome of Board File Nos. 3372-94-R and 1165-95-R. The applicants seek a declaration in the instant proceedings that Con-Ex and the Dobben group of companies are jointly liable for any order which the Board may make in Board File Nos. 1164-95-G and 3373-94-G.

Board File No. 1165-95-R - Related Employer Issue

5. It is not disputed that all four of the responding parties are under the common control and direction of Lucus Dobben. Mr. Dobben is the sole officer and director as well as the individual responsible for the day-to-day operations of all of the responding parties. The issues to be determined are whether Con-Ex and the Dobben group of companies carry on associated or related activities or businesses and whether the Board should exercise its discretion to declare Con-Ex and the Dobben group of companies to constitute one employer for the purposes of the Act.

The Evidence

- 6. Mr. Dobben testified on behalf of the responding parties. The applicants did not call any evidence.
- 7. The response filed on behalf of the responding parties in Board File No. 3372-94-R asserted that Group was a general contractor, Dobben was engaged in concrete forming work and that Marcon performed sewer and watermain and related earth work. Mr. Dobben testified, however, that the response is wrong and that Dobben, Group and Marcon were all engaged exclusively in concrete forming work. Mr. Dobben testified that he had a great deal of difficulty getting paid by general contractors for concrete forming work and thus he had decided that the concrete forming business was not for him. He ceased carrying on business through Dobben, Group and Marcon. Mr. Dobben has no intention of ever engaging in concrete forming work again.
- 8. Mr. Dobben incorporated Con-Ex on March 31, 1995 in order to engage in earth work including excavation, grading and sewer and watermain work. Con-Ex's largest job to date has been the performance of earth work in connection with the Price/Costco Distribution Centre (the "Price/Costco job"). Mr. Dobben testified the Price/Costco job involved dirt removal and bringing fill onto the site. Con-Ex was also responsible for some pipe installation and granular replacement for slab on grade. Since completing the Price/Costco job, Con-Ex has been engaged in topsoil removal, grading and supplying dump sites to other contractors. Board File No. 1164-95-G is a referral of a grievance to arbitration under section 133 of the Act in which it is alleged that Con-Ex

has violated the terms of the Carpenters' Provincial Agreement in connection with work performed on the Price/Costco job.

- 9. Con-Ex works for completely different clients than Dobben, Group and Marcon previously worked for. Con-Ex does not use equipment previously used by Dobben, Group or Marcon and has its own distinct premises and phone and fax numbers. Con-Ex does not employ any employees.
- Mr. Dobben is a 38 year old journeyman carpenter. He served his apprenticeship under his father over a period of 15 years from the age of 18 to 33. Mr. Dobben has also been to school for earth work and has received a diploma as a quantity surveyor. Prior to going into the concrete forming business with Marcon, it was Mr. Dobben's intention to become a general contractor. Although Mr. Dobben indicated that he would like to work as a general contractor, he has no intention of doing so at this time.

Associated or Related Activities or Businesses

12.

- The Board has considered the meaning of "associated or related activities or businesses" in connection with entities engaged in the construction industry on a number of occasions. As the Board indicated in *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720, firms in the construction industry can, with relative ease, become involved in various sectors, subdivisions, phases, or specialized kinds of construction work. The following quote from *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 explains why this is so:
 - 13. Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase "whether or not simultaneously". The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and, business may be effectively transferred from one corporate entity to another, without any of the indicia of a "transfer of a business" which might trigger the application of section 55 [now section 69]. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required after it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of business between related businesses without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. Indeed there will often be good commercial reasons for doing so unrelated to any express desire to undermine the union's bargaining rights. The earlier company may have run into financial difficulties, or lost its reputation, or there may be legal, accounting or tax advantages in establishing a new vehicle through which the business, or related business activities can be conducted. Again, it is quite possible to do this without a clear and concrete disposition between the two firms so as to call section 55 [now section 69] into play. To ensure that the industrial relations status quo is preserved, the Legislature has provided that where two employers carry on related economic activities, under common control and direction, whether or not simultaneously, they can be treated as one for the purposes of the Act. However, it should be noted that section 1(4) is discretionary. The Board need not make a 1(4) declaration even when the conditions precedent are present; and has not done so, for example, where a trade union is seeking to extend rather than preserve its bargaining rights.
 - It is as a result of the relative ease with which a small construction company can engage

in a variety of different types of construction work that the Board has determined that entities may not be found to be "unrelated" simply because they are engaged in different types of construction work (see also: *Warren Steeplejacks Limited*, [1989] OLRB Rep. March 309 and *Stebill Limited*, [1989] OLRB Rep. April 384).

13. Con-Ex and the Dobben group of companies are all small construction companies. As the above summary of the evidence indicates, Con-Ex has no assets or employees. It rents its equipment. Thus, even assuming that the Dobben group of companies was engaged exclusively in concrete forming work, and that Con-Ex is engaged solely in excavation work (the most favourable version of the facts from the perspective of the responding parties), it is our view that the Dobben Group of companies and Con-Ex carry on associated or related activities or businesses.

Exercise of the Board's Discretion

- Where the Board finds two or more entities to carry on associated or related activities or businesses under common direction or control, the Board has a discretion as to whether it will declare such entities to constitute one employer for the purposes of the Act.
- The applicants argue that the Board ought to exercise its discretion in favour of granting the application in order to prevent their bargaining rights from being undermined. In the applicants' submission, absent a declaration, their bargaining rights stand to be eroded in two ways. First, the potential exists that Con-Ex may perform work covered by the Carpenters' Provincial Agreement in the future. A declaration is required in order to ensure such work is performed by the applicants' members. Second, it is asserted that a declaration is warranted in order to make Con-Ex jointly liable for outstanding debts owing to the applicants by Group. If Con-Ex is not made jointly liable for such debts, the applicants assert that their effectiveness on behalf of their members will be undermined.
- 16. The purpose and effect of section 1(4) of the Act is discussed in the following passage from *Brant Erecting and Hoisting, supra*:
 - 12. Section 1(4) of *The Labour Relations Act* provides as follows:

"Where, in the opinion of the Board associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate".

Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 [now section 69] which preserves the established bargaining rights and collective agreement when a "business" is transferred from one employer to another. Section 55 [now section 69] has been part of the scheme of the Act since the mid 1960's. Neither remedial provision requires a finding of anti-union animus; their primary application is to bona fide business transactions which incidentally under-

mine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

- 17. In the course of determining whether to exercise its discretion under section 1(4), one of the factors the Board considers is whether the entity which the union seeks to have declared related (the "related company") is performing work, or there is a real potential that it will perform work, which would, if the declaration was made, be covered by the collective agreement. Where such is the case, a section 1(4) declaration is generally warranted in order to ensure that the union's bargaining rights are preserved and not undermined. Where the Board has found that the related company is not performing work which falls within the scope of the agreement, the Board has declined to exercise its discretion on the basis that such a declaration is of extremely limited utility (see: Farquhar Construction Limited, [1978] OLRB Rep. Oct. 914; Dominion Stores Limited, [1979] OLRB Rep. June 506; and Valdi Inc., [1979] OLRB Rep. Aug. 833).
- 18. In the present case, the evidence does not establish that Con-Ex is performing work covered by the Carpenters' Provincial Agreement. Although counsel for the applicant objected to Mr. Dobben testifying as to whether Con-Ex performed any work covered by the agreement, he did not challenge, either by way of cross-examination or by way of independent evidence, Mr. Dobben's description of the work Con-Ex has performed. Thus, the sole evidence available to the Board concerning the nature of the work performed by Con-Ex to date is that given by Mr. Dobben. In our view, this evidence does not establish that Con-Ex has performed work covered by the Carpenters' Provincial Agreement.
- 19. Counsel for the applicant argued that the Board should exercise its discretion on the basis that Con-Ex may potentially perform work covered by the Carpenters' Provincial Agreement in the future. Counsel asserts that the Board should be suspicious of Mr. Dobben's claims that he does not intend to engage in work covered by the Carpenters' Provincial Agreement and points to the fact that Mr. Dobben is a journeyman carpenter, and has a desire to become a general contractor, as indicators that Con-Ex will likely become involved in work covered by the Carpenters' Provincial Agreement in the future. Counsel also asserted that the Board should infer from the fact that Mr. Dobben is contesting this application that he intends to perform work covered by the agreement. Counsel suggests that, if Mr. Dobben did not intend to do so, he would consent to the Board making the declaration sought by the applicants.
- We are not persuaded by the evidence before us that there currently exists a real potential that Con-Ex will engage in work covered by the Carpenters' Provincial Agreement in the future. Mr. Dobben explained that he had considerable difficulty getting paid for the concrete forming work he performed via the Dobben group of companies and accordingly decided to get out of carpentry work. After speaking with friends he decided to try excavation work. Since incorporation, Con-Ex has engaged solely in excavation work. Although Mr. Dobben indicated he has a desire to become a general contractor he has taken no steps to make this desire a reality. We find the suggestion that the Board should draw an adverse inference from the fact that Mr. Dobben is contesting this application untenable especially where, as on the facts of this case, the applicants are seeking a section 1(4) declaration, in part, to have Con-Ex declared liable for the outstanding debts of Group.
- 21. Thus, it is our determination that there is presently no real potential that Con-Ex will become engaged in work covered by the Carpenters' Provincial Agreement in the foreseeable future. Hence, it is our determination that a declaration that the Dobben group of companies and Con-Ex are one employer for the purposes of the Act is not presently required in order to prevent the transfer of bargaining unit work from the Dobben group of companies to a non-union entity.

- Counsel for the applicants also argued that the Board ought to exercise its discretion and declare the Dobben group of companies and Con-Ex to constitute one employer for the purposes of the Act in order to make all of the responding parties jointly liable for the outstanding debts of one another. In counsel's submission, the only mechanism available to a trade union to enforce its bargaining rights is the ability to force an employer to pay damages to the trade union for its violations of the collective agreement. If an employer can avoid paying damages by simply shutting down and starting up a new company, the union's sole enforcement mechanism would be rendered ineffective. Counsel relies on *Golden Arm Flooring Inc.*, [1992] OLRB Rep. June 731 and *Lakeridge Acoustics*, [1993] OLRB Rep. Feb. 137.
- The issue of whether a declaration under section 1(4) of the Act will be granted, solely for the purpose of making the entities in question jointly liable for outstanding debts to the applicant union, has been considered by the Board in *Total Marketing Incorporated*, [1983] OLRB Rep. April 616 and *Duron Ottawa Ltd.*, Board File No. 3374-93-R, dated October 26, 1994, unreported. The following quote from *Duron Ottawa Ltd.*, which in turn quotes from *Total Marketing Incorporated*, provides an overview of the facts, and the basis for the Board's determination, in each of the cases:
 - 35. In *Total Marketing, supra*, the Board indicated that section 1(4) is not intended to give a party to a collective agreement "the right to a 'deep pocket' recovery of an unsatisfied debt against a related corporation". However, it is clear that the Board's comments were directed to the circumstances before it wherein, absent any transfer of work or evidence that the union's bargaining rights had been undermined, the union was seeking to have a parent corporation made liable for the debts of its subsidiary:
 - 4. It is clear that Sepcographics Incorporated has ceased operations, and that the work which it performed is no longer being done. There has been no transfer of work, and in that sense no undermining or erosion of the applicant's bargaining rights. If it appeared on the material before us that the respondent had spun off a similar company to do identical work the case might be more compelling for relief, whether by way of declaration of successorship under section 63 [now section 69] of the Act or by the application of section 1(4). In those circumstances the Board could, by the operation of section 1(4) pierce the corporate veil in the interests of protecting the bargaining rights. (See e.g., *Devon Studio*, [1980] OLRB Rep. July 961). Those facts are not shown in the instant case. The purpose of section 1(4) of the Act is to preserve bargaining rights. It is not intended to give a party to a collective agreement the right to a "deep pocket" recovery of an unsatisfied debt against a related corporation.

The Board clearly distinguished the situation where a new corporate structure has been created to perform the work previously performed by a related entity and accordingly we do not view the Board's comment in *Total Marketing* to be applicable to the facts before us.

- 36. In the present case, Duron failed to pay the wages or remittances required by its collective agreement with Local 527 during the period of November 1992 to November 1993. Local 527 sought to enforce the terms of its agreement with Duron by filing a grievance in August 1993 and pursuing that grievance to arbitration in January 1994. Local 527 was successful at arbitration and obtained a Board order pursuant to which Duron is required to pay Local 527 all outstanding union dues, vacation pay, benefits, pension contributions and wages. Duron has not satisfied the Board order, however, as our findings set out above indicate, Duron is essentially continuing to operate, although on a smaller scale, in the form of Conite. In the Board's view, to permit Duron, by way of a change in form, to avoid complying with the terms of its collective agreement or the requirement that it satisfy a Board order compensating the union and its members for violation of the collective agreement, would negate the contractual rights of Local 527's members and undermine Local 527's bargaining rights.
- 37. Accordingly, the Board declares that Duron Ottawa Ltd. and 694280 Ontario Inc. c.o.b. as Conite are one employer for the purposes of the Act. As a consequence, Conite is liable to pay to the applicant the amount outstanding under the Board order against Duron.

- As the above excerpt indicates, in determining whether it will grant a section 1(4) declaration for the sole purpose of making the responding parties jointly liable for debts owing to the applicant union, the Board has distinguished between the situation where the related company is performing work covered by the collective agreement and the situation where it is not. Where work is continuing to be performed under the collective agreement, the Board has found the issuance of a section 1(4) declaration appropriate in order to make the related entities jointly liable for outstanding debts and prevent the union's bargaining rights from being undermined. Where, however, the related entity is not performing work covered by the agreement, the Board has declined to issue the declaration as the sole purpose for the declaration would be to provide the union with a "deep pocket" from which to recover an outstanding debt.
- In our view, the distinction which has been drawn by the Board is a valid one. The purpose of section 1(4) is to protect bargaining rights. If a trade union's bargaining rights have been undermined by a change in corporate form and part of that erosion is caused by the union's inability to enforce the collective agreement, a section 1(4) declaration will issue. If, however, the trade union's inability to enforce its collective agreement arises out of circumstances apart from a situation where section 1(4) is warranted, for example a change in commercial activities that does not erode bargaining rights, a section 1(4) declaration will not issue simply to provide the trade union with an entity from which to collect an outstanding debt.
- 26. Con-Ex has not, and is not presently, performing work covered by the Carpenters' Provincial Agreement. In such circumstances, it is our determination that it would not be appropriate to issue a declaration under section 1(4) for the sole purpose of making Con-Ex jointly liable for the outstanding debts of the Group.
- 27. For the reasons set out above, it is our determination that a declaration under section 1(4) of the Act declaring Con-Ex and the Dobben group of companies to constitute one employer for the purposes of the Act is not appropriate at this time. Given that our determination is based on the fact that Con-Ex is not performing work covered by the Carpenters' Provincial Agreement, the applicant is not precluded from bringing a further application in the event Con-Ex engages in such work in the future.

Board File No. 3372-94-R - Joint Liability Issue

- As indicated above, by decision dated May 30, 1995 in Board File 3372-94-R, the Board declared Group, Dobben and Marcon to constitute one employer for the purposes of the Act. The applicants request that the Board declare Dobben and Marcon liable for the outstanding debts of Group, Group, Dobben and Marcon were, prior to their cessation of business, all performing work covered by the Carpenters' Provincial Agreement. In our view, for the reasons expressed by the Board in *Duron Ottawa Ltd.*, it is appropriate that the Dobben Group of companies be made jointly liable for outstanding debts owing to the applicants.
- 29. The Board therefore declares that Dobben Construction Inc. and Marcon Contractors are jointly liable for the debts of Dobben Group Inc. owing to the United Brotherhood of Carpenters and Joiners of America, Local 2050 as a result of a Board order in Board File No. 2509-94-G and to the Carpenters and Allied Workers, Local 27 United Brotherhood of Carpenters and Joiners of America as a result of a Board order in Board File No. 3543-94-G.

Board File Nos. 3373-94-G and 1164-95-G - Joint Liability Issue

30. The applicants also seek a declaration that Con-Ex, Dobben, Group and Marcon are

jointly liable for any order which the Board may make in Board File Nos. 1164-95-G and 3373-94-G.

- 31. Board File No. 1164-95-G is a referral of a grievance in which it is alleged that Con-Ex violated the Carpenters' Provincial Agreement in connection with the Price/Costco job. The applicants' assertion that Con-Ex is bound to the Carpenters' Provincial Agreement was premised on their assertion that Con-Ex is a related employer to the Dobben group of companies. In view of our findings herein, the applicants have until February 23, 1996 to write to the Board giving any reason why Board File No. 1164-95-G ought to proceed. If no such submissions are received from the applicants, Board File No. 1164-95-G will be dismissed.
- Board File No. 3373-94-G has been held in abeyance pending the outcome of Board File 1165-95-R. The grievance has not proceeded to a hearing and accordingly no Board order has been made. Given our findings herein, and for the reasons expressed herein, we decline to declare Con-Ex jointly liable for any damages which may be found to be owing to the applicants in Board File 3373-94-G. In our view, whether all or some of Dobben, Group and Marcon are to be held liable for damages which may be ordered by the Board is more appropriately dealt with after the grievance has been heard on its merits. Accordingly, we decline to make any declaration concerning which of Dobben, Marcon or Group would be held liable for damages awarded to any of the applicants in Board File No. 3373-94-G.
- 33. The applicants are to notify the Registrar if they wish Board File No. 3373-94-G to be listed for hearing. If no such request is made within a period of one year, this matter will be terminated.

This panel is seized.	
-----------------------	--

3652-95-R Erin Park Automotive Limited, Applicant v. National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW-Canada), Responding Party

Termination - Employer seeking to terminate union's bargaining rights for failure to bargain - No evidence that union "sleeping on its rights" - Application dismissed for failure to disclose prima facie case

BEFORE: Janice Johnston, Vice-Chair, and Board Members J. A. Ronson and D. A. Patterson.

APPEARANCES: Peter Pickering and Patrick Melady for the applicant; Janice Chung, Joe McCabe and Ian Scott for the responding party.

DECISION OF THE BOARD; February 20, 1996

- 1. The name of the responding party is hereby amended to read: "National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW-Canada)".
- 2. At the hearing scheduled to deal with this matter on February 19, 1996 the Board gave the following oral ruling:

- 1. The Board has before it in this case an application by the employer in which it is seeking a vote of its employees pursuant to section 65(2) of the *Labour Relations Act*, 1995 to determine if the bargaining rights of the union should be terminated.
- 2. At the commencement of today's proceedings, the responding party moved that this application be dismissed as it does not disclose a *prima facie* case for the relief requested.
- 3. In accordance with the submissions of the parties, both written and oral, the factual findings which follow have been agreed to. For the purposes of deciding this motion we are prepared to assume they are true.
- 4. On August 8, 1995, the responding party was certified on an interim basis for a bargaining unit of employees of the applicant. On September 1, 1995 written notice of a desire to bargain was given to the applicant. On November 9, 1995 a meeting was organized by the union with the employer to allow the parties to introduce themselves. At this meeting the union undertook to prepare bargaining proposals.
- 5. The union requested, and the employer agreed, on November 15, 1995 to allow two union bargaining committee members time off to prepare bargaining proposals.
- 6. In December, 1995, the parties had telephone conversations and exchanged correspondence on issues in the workplace.
- 7. In January, 1996 numerous phone calls were attempted by both parties and messages were left. On January 15, 1996 the employer advised the union that it had initiated the application currently before the Board and no further attempts to negotiate have occurred.
- 8. On January 8, 1996 the employer wrote to the union what appears to be a summary of all the complaints it has about the union's representation of its members. It provoked a sharp and pointed response from the union. The employer pointed to this letter as indicative of the union's focus on other matters in the workplace, which has in the employer's view, resulted in a failure to negotiate on the part of the union.
- 9. Based on the facts as set out above and after carefully reviewing all of the submissions of the parties and the jurisprudence provided by the responding party, we are of the view that this application should be dismissed for a failure to make out a *prima facie* case for the relief requested.
- 10. The Board's jurisprudence is clear that section 65(2) is to be used as a shield not as a sword (see in this regard *Dominion Stores Ltd.*, 56 CLLC 18,047 and *Medi-Park Lodges Inc.*, [1979] OLRB Rep. Oct. 1007).
- 11. While clearly, the negotiations have not been proceeding smoothly there is no indication that the union has not been making every effort to bargain with the employer. In no way has the union "slept on its rights" as that phrase has been used in the Board's jurisprudence. (See *Prescott Machine &*

Welding Inc., [1983] OLRB Rep. Feb. 250 and City Cab, [1987] OLRB Rep. July 955).

12. Accordingly, this application is dismissed.

0887-92-R Labourers International Union of North America, Local 183, Applicant v. Ferretti Forming Inc., Fer-Pal Construction Ltd., Responding Parties v. International Union of Operating Engineers, Local 793, Intervenor

Construction Industry - Related Employer - Companies A and B conceding that pre-conditions to granting section 1(4) relief present, but submitting that Board ought to exercise discretion against making single employer declaration - Board finding it inappropriate to grant section 1(4) relief for various reasons, including fact that Company A was incorporated before Company B, each entity performed its owns type of work, there was no common pool or interchange of employees, the companies had been used in a way that had not compromised the union's bargaining rights, and the union had represented at the time collective agreement was entered into that it would have no impact on Company A - Application dismissed

BEFORE: Ken Petryshen, Vice-Chair, and Board Members F. B. Reaume and C. McDonald.

APPEARANCES: S. B. D. Wahl, A. Dionisio, Keith B. Cooper, Frank Palazzolo and Tony Candiano for the applicant; C. E. Humphrey and Paul Ferretti for the responding parties; David Watson and Gail Jacklin for the intervenor.

DECISION OF THE BOARD; February 23, 1996

- 1. This is an application in which Labourers International Union of North America, Local 183 ("Local 183") seeks relief under section 1(4) and what is now section 69 of the *Labour Relations Act*, 1995. During his opening statement, counsel for Fer-Pal Construction Ltd. ("Fer-Pal") and Ferretti Forming Inc. ("Ferretti Forming") denied that a sale of a business had occurred and conceded that the three pre-conditions to granting section 1(4) relief were present in the circumstances in this case. The focus of the evidence and the representations of the parties therefore was on Local 183's claim that the Board should exercise its discretion by declaring Ferretti Forming and Fer-Pal to be a single employer within the meaning of section 1(4) of the Act.
- 2. Paul Ferretti, the key figure in the operation of Fer-Pal, has considerable experience in the construction industry. While employed with the Cliffside Pipelines, he worked initially as a construction labourer and eventually became an assistant superintendent. After leaving Cliffside Pipelines, Paul Ferretti and his father operated R & N Excavating. Paul Ferretti and his wife Anna Ferretti incorporated Fer-Pal in 1986. Paul Ferretti initially planned to go into business with Tony Palazzolo but Mr. Palazzolo experienced family difficulties which prevented him from developing a business relationship with Paul Ferretti. The "Pal" in Fer-Pal is a reference to Tony Palazzolo. The funds for the incorporation of Fer-Pal and for its operation came from Paul and Anna Ferretti. During the relevant period, Fer-Pal was owned by two holding companies. Seventy-two percent of the shares are owned by Ferretti Investments Limited which is owned by Paul and Anna Ferretti. The remaining twenty-eight percent of the shares are owned by Gavia Limited which is owned by Shaun and Rosemary McKaigue. Paul Ferretti and Shaun McKaigue manage Fer-Pal on a day-to-

day basis. Paul Ferretti handles the bidding process while Shaun McKaigue primarily looks after the on-site construction.

- Fer-Pal provides on-site services for industrial buildings. Fer-Pal engages in the excavation of and pouring of footings, and the installation of storm sewers, sanitary sewers and watermains. Fer-Pal also performs grading for roads, and installation and compacting relating to sewers. In 1992, Fer-Pal began the relining of waterlines. Fer-Pal purchased the equipment to engage in the relining work from the liquidators of Clearline Cement Line Inc. ("Clearline"). An Order of the Ontario Court (General Division) ordered that Clearline be liquidated and dissolved. The Board is satisfied that Fer-Pal's purchase of this equipment did not result in the sale of Clearline's business or a part thereof to Fer-Pal. Fer-Pal merely bought some assets. Fer-Pal's level of business has ranged between \$600,000 per year in its formative stage and \$2,000,000 recently.
- 4. Fer-Pal has a bargaining relationship with the International Union of Operating Engineers, Local 793 ("Local 793"). Subsequent to the commencement of this proceeding, Local 793 attempted to intervene in this case. In a decision dated February 28, 1994, the Board ruled that Local 793 did not have status to intervene in this proceeding.
- 5. Ferretti Forming was incorporated in May, 1990 and is owned sixty percent by Fer-Pal and forty percent by Danny Ferretti, the brother of Paul Ferretti. Prior to the formation of Ferretti Forming, Danny had been employed as a carpenter by a number of firms to form and pour vaults for public utilities such as Bell Telephone and Ontario Hydro. Paul Ferretti testified that he assisted in the formation of Ferretti Forming in order to help his brother who was unemployed at the time. The work of Ferretti Forming has been primarily the forming and pouring of vaults for public utilities. Since its formation, its annual business has ranged between \$130,000 to \$180,000 per year.
- day management of that business insofar as it relates to utility work. Danny prepares the bids for the utility work and gives them to Paul or Anna Ferretti to write up and to fax the bids. Paul testified that he and Anna, who is the receptionist and does the payroll for Fer-Pal, provides this kind of assistance to Danny since Danny has little formal education in Canada. Ferretti Forming uses the same office as Fer-Pal as well as Fer-Pal's secretary and equipment. Messages are taken for Danny and conveyed to him. Ferretti Forming stores some material in Fer-Pal's yard. Fer-Pal charges Ferretti Forming for the services it provides. Danny Ferretti has no interest in Fer-Pal nor is Danny in any way involved in the management of Fer-Pal.
- 7. On May 26, 1991 Ferretti Forming became bound to Local 183's "Independent Utility Agreement" ("the Agreement"). The Agreement was signed by Paul Ferretti on behalf of Ferretti Forming and Frank Palazzolo, a business agent for Local 183 and the brother of Tony Palazzolo. There is considerable conflict in the evidence concerning the events and the discussions which occurred between the Ferretti's and Frank Palazzolo leading to the execution of the Agreement.
- 8. The Ferretti's testified that there were three meetings with Frank Palazzolo. The first meeting was in late 1990 or early 1991 with Paul and Danny Ferretti. Another meeting occurred in March with Anna Ferretti and a third meeting occurred approximately a week later on February 26, 1991 with Paul and Anna Ferretti when the agreement was signed. The Ferretti's testified that they knew the Palazzolo family well and Paul indicated he knew Frank for approximately five years. The Ferretti's also testified that they did not see the draft agreement prior to the day Paul signed it. The Ferretti's also testified that all of the meetings occurred in Fer-Pal's office where there is no indication, even on its sign, of Ferretti Forming's presence. Frank Palazzolo testified that he attended two meetings in March in which all three of the Ferretti's were present and that he

left a copy of the Agreement with the Ferretti's at the first meeting. Frank also testified that he did not know the Ferretti's until he met them in March 1991 and that the sign outside Fer-Pal's office did make a small reference to Ferretti Forming.

- 9. In the first meeting and the meeting of March 26, 1991, the Ferretti's claimed that Fer-Pal was discussed. Ferretti Forming was created as a vehicle for Danny Ferretti and since Ferretti Forming was experiencing difficulty on union jobs, the Ferretti's were prepared to enter into a bargaining relationship with Local 183. But Paul and Anna Ferretti did not want an agreement between Local 183 and Ferretti Forming to impact on their main enterprise, namely Fer-Pal. Paul testified that he specifically asked at the first meeting with Frank Palazzolo whether the Agreement would affect Fer-Pal and he claims that Frank told him that the Agreement would only apply to Ferretti Forming and the utility work performed by Danny Ferretti. Anna testified that she raised the same issue on March 26, 1991 before the Agreement was signed. She testified that Frank again indicated that the Agreement would only cover Ferretti Forming. Frank Palazzolo testified that he asked about Fer-Pal and was told that it did not perform any work and that all the work was bid under Ferretti Forming and only it utilized construction labourers.
- 10. The Board has carefully reviewed and weighed the testimony of Paul and Anna Ferretti and Frank Palazzolo. After having considered the general demeanour of those witnesses, their ability to relate the events clearly and to resist the influence of self-interest, and given what is most probable in the circumstances, the Board prefers the evidence of the Ferretti's where it conflicts in any material way with the evidence given by Frank Palazzolo.
- Counsel for Local 183 submitted that the way in which Fer-Pal and Ferretti Forming conducted business both before and after the Agreement was signed demonstrated the truth of Mr. Palazzolo's evidence, however inelegant it may have been. For us, Mr. Palazzolo's lack of elegance while testifying is irrelevant and we did not find that the actions of Fer-Pal and Ferretti Forming both before and after the execution of the 1991 Agreement provided a useful context in which to evaluate Mr. Palazzolo's version of what the Ferretti's told him. Quite simply, in light of all of the evidence, it is difficult to accept the evidence of Mr. Palazzolo as true. A number of inconsistencies between the Ferretti's evidence and Mr. Palazzolo's was not evident until Mr. Palazzolo gave his evidence-in-chief. The Ferretti's gave their evidence about the number of meetings, who was present, and when they first saw the Agreement without any suggestion in cross-examination that Mr. Palazzolo would give different evidence on these matters. The meetings between the Ferretti's and Mr. Palazzolo took place at Fer-Pal's office where there is no indication of any business activity carried on by Ferretti Forming. Although the Ferretti's deny it, Mr. Palazzolo suggests that he asked about Fer-Pal and was merely told that Fer-Pal was not doing any work and all of the construction labourers' work would be performed by Ferretti Forming. On his own evidence, Mr. Palazzolo does not make any further inquiries about Fer-Pal. He apparently does not ask what work Fer-Pal performed in the past, whether it would start operating in the near future or what was the operating relationship between Fer-Pal and Ferretti Forming. One would reasonably expect that an experienced business agent such as Mr. Palazzolo would have made such inquiries and others if he had any concern at the time about Fer-Pal, particularly when he claims that he did not know the Ferretti's prior to March 1991. The fact that such inquiries were not made is an indication that Mr. Palazzolo's version of the discussion is not credible. Although a small point, Mr. Palazzolo's insistence that the sign outside Fer-Pal's office referred to Ferretti Forming while all the other evidence suggests otherwise, is reflective of a number of concerns we had with his evidence.
- 12. The Board accepts the Ferretti's version of what occurred. Ferretti Forming was formed in order to assist Danny Ferretti in obtaining the work of forming and pouring utility vaults. The

Ferretti's initiated the effort to obtain an agreement with Local 183 in order to give Danny Ferretti access to union jobs. The Ferretti's made contact with Frank Palazzolo, someone they knew, who told them that Danny could continue performing his utility work and the Agreement was eventually executed. Frank Palazzolo knew the work Ferretti Forming performed and indicated to the Ferretti's that the Agreement would not have an impact on Fer-Pal. The Ferretti's did not advise Mr. Palazzolo that Ferretti Forming would bid all of the Ferretti's work and only it would use construction labourers. The Board is satisfied that in March, 1991 Local 183 obtained bargaining rights for Ferretti Forming and not for the entire business enterprise of the Ferretti's.

- The Board heard considerable evidence about a number of jobs in which Fer-Pal and Ferretti Forming were involved subsequent to the execution of the Agreement. We do not propose to review the evidence concerning these jobs in detail. The Board agrees with the assessment of counsel for Fer-Pal and Ferretti Forming that this evidence does not disclose an erosion of Local 183's bargaining rights or a scheme by the Ferretti's to erode Local 183's bargaining rights. There is no evidence that any work normally performed by Ferretti Forming was transferred to Fer-Pal or that there was a movement of employees between the companies. During the summer of 1991 Ferretti Forming became bound to both the Labourers and the Carpenters' Provincial Collective Agreements. It appears that work was generated by Fer-Pal for Ferretti Forming which was performed under the appropriate collective agreements.
- The material circumstances in this case are not unlike those in a number of cases decided by this Board where there are two related entities and one of the entities voluntarily enters into a bargaining relationship with a trade union in order to obtain work on unionized projects. In B & M Millwork Ltd., [1991] OLRB Rep. April 438, the Board describes circumstances where it is not generally inclined to exercise its discretion to grant a section 1(4) declaration. At page 445 the Board made the following comments:
 - 34. The authorities cited for counsel by the respondents were more apposite to the circumstances before us. The Board's decisions in *Bramalea Carpentry Associates*, [1981] OLRB Rep. July 844, *Gerald Davidson Plumbing & Heating*, [1984] OLRB Rep. Mar. 462 and *Vallance & Levy Eng. Contractors Ltd.*, Board File No. 2403-83-M, August 16, 1984, unreported), demonstrate that the Board has not found it appropriate to make a section 1(4) declaration in circumstances where a non-unionized company pre-exists a company which is incorporated by the same principal(s) and voluntarily enters into a collective bargaining relationship with a trade union in order to be in a position to perform work on unionized job sites, where there is no common pool of employees (as there was in *Industrial Mine Installations Limited*, [1972] OLRB Rep. Dec. 1029, for example) or interchange of employees between them and there is no indication that work destined for the unionized company has been diverted to the non-union company or that the non-union company and the trade union. . . .
- The facts here suggest that it would be inappropriate to exercise our discretion to grant section 1(4) relief. Fer-Pal was incorporated before Ferretti Forming and each entity performs its own type of work. Ferretti Forming voluntarily entered into a bargaining relationship with Local 183 in order to secure work on unionized projects. There is no common pool or interchange of employees. The two companies had been used by the Ferretti's in a way that has not compromised Local 183's bargaining rights. In addition, as we found earlier, the Board is satisfied that Frank Palazzolo represented to the Ferretti's at the time that the 1991 Agreement was executed that that Agreement would not have any impact on Fer-Pal.
- 16. For the above reasons, this application is dismissed.

4151-93-U International Brotherhood of Electrical Workers, Local Union 1788, Applicant v. International Brotherhood of Electrical Workers, Responding Party v. The IBEW Electrical Power Systems Construction Council of Ontario and International Brotherhood of Electrical Workers, Local Unions 105, 115, 120, 303, 402, 530, 586, 773, 804, 894, 1687 and 1739; Electrical Power Systems Construction Association and Ontario Hydro; International Brotherhood of Electrical Workers, Local Union 353, Intervenors

Alteration of Jurisdiction - Construction Industry - Parties - Practice and Procedure - Unfair Labour Practice - IBEW Local ("Local 1788") alleging that IBEW (the "International") altering its jurisdiction without just cause contrary to Bill 80 amendments to the Act - Board granting standing to IBEW Electrical Power Systems Construction Council of Ontario, various locals of IBEW, EPSCA, and Ontario Hydro and denying standing to IBEW Construction Council of Ontario and to Electrical Contractors Association of Ontario - Board directing applicant Local 1788 to call its evidence first - On the merits, Board determining that International had altered Local 1788's jurisdiction as alleged, but that it had just cause to do so - Board satisfied that alteration of jurisdiction likely to facilitate viable and stable collective bargaining without causing serious labour relations problems - Application dismissed

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members F. B. Reaume and G. McMenemy.

APPEARANCES: L. A. Richmond, J. Sprackett, H. Bartlett and J. Rawlings for the applicant I.B.E.W. Local 1788; David A. McKee and Ken Woods for the responding party I.B.E.W.; A. M. Minsky, R. Tersigni and D. Ryan for IBEW-EPSCCO; S. G. Thompson, E. Roberts and Jim Mason for ECAO of Ontario; M. Patrick Moran, Ted Kovacs and Neil Donnelly for EPSCA and Ontario Hydro; William Robinson, Joe Fashion, John Morrow and Bob Gill for International Brotherhood of Electrical Workers, Local Union 353.

DECISION OF THE BOARD; February 9, 1996

I What this application is about

- 1. This is an application under section 96 (section 91 at the time it was made) of the Labour Relations Act, 1995. In the application as filed, the applicant International Brotherhood of Electrical Workers, Local Union 1788 ("Local 1788") alleged that its parent, the International Brotherhood of Electrical Workers (the "International") has violated sections 147, 149 and 73(2) (sections 138.3, 138.5 and 68(2) respectively at the time the application was made) of the Labour Relations Act, 1995 by altering the jurisdiction of Local 1788 as it existed on May 1, 1992 without just cause and without giving Local 1788 the requisite written notice that it intended to do so, thereby interfering with Local 1788's autonomy without just cause. The International denies that it has breached the Act in any way.
- 2. The alleged change in jurisdiction in issue is in the electrical power systems sector, and specifically under two collective agreements commonly known as the Generation Projects Agreement and the Transmission Agreement.
- 3. Ultimately, Local 1788 withdrew its allegations under subsection 73(2) of the Act, and it did not pursue any allegations under section 149. Accordingly, this case concerns the interpretation

and application of section 147 of the Act to an alleged alteration of Local 1788's jurisdiction by its parent, the International.

II The Parties and Issues of Status

- Power Systems Construction Council of Ontario (the "IBEW EPSCCO"), the International Brotherhood of Electrical Workers, Local Unions 105, 115, 120, 303, 402, 530, 586, 773, 804, 894, 1687 and 1739 (the IBEW EPSCCO and these Local Unions were all represented by Mr. Minsky), the Electrical Power Systems Construction Association (the "EPSCA") and Ontario Hydro (both of whom were represented by Mr. Moran and subsequently Mr. Kovacs), and the International Brotherhood of Electrical Workers, Local Union 353 ("Local 353") were all entitled to intervene and to participate in this proceeding. The IBEW EPSCCO and the IBEW Local Unions other than Local 353 have intervened in support of the International. Local 353 has intervened in support of Local 1788. The EPSCA and Ontario Hydro take no position with respect to the internal dispute between the IBEW entities but have intervened to protect their interests with respect to the two collective agreements covering electrical construction work in the electrical power systems sector of the construction industry which are front and center in this application; namely:
 - a) the collective agreement between the EPSCA and the IBEW EPSCCO representing IBEW Local Unions 105, 115, 120, 303, 353, 402, 530, 586, 773, 804, 894, 1687, 1739 and 1788; commonly referred to as the "Generation Projects Agreement";
 - b) the collective agreement between the EPSCA and Local 1788; commonly referred to as the "Transmission Agreement".
- 5. In that same April 13, 1994 decision the Board dismissed the interventions of the IBEW Construction Council of Ontario (the "IBEW CCO") and the Electrical Contractors Association of Ontario (the "ECAO"). These entities are parties to the provincial collective agreement covering electrical construction work in the industrial, commercial and institutional ("ICI") sector of the construction industry, and to what is commonly referred to as the "Provincial Line Work Agreement".
- 6. A party which seeks to intervene in a proceeding before the Board must demonstrate either that it has a real direct discernible interest in the proceeding, or persuade the Board that it is able to provide the Board with assistance which will ensure that all relevant issues are properly presented such that it should be granted a kind of amicus curiae status. Amicus curiae status, which is granted as a matter of the Board's discretion as the master of its own proceedings, has rarely been granted by the Board. (In Kidd Creek Mines Ltd., [1984] OLRB Rep. Mar. 481, the United Steelworkers of America was granted amicus curiae intervenor status limited to making representations on the legal and policy issues raised by an application for certification by the IBEW, Local 1687 for a bargaining unit of maintenance electricians, notwithstanding that the Steelworkers neither represented any of the employees directly affected by the application nor sought to do so. Intervenor status was granted on the basis that the Steelworkers was the dominant trade union in the mining industry and represented many mine maintenance electricians within broader based bargaining units out of their mines. On the other hand, in New Dominion Stores, [1986] OLRB Rep. Apr. 519, the Steelworkers was denied such intervenor status.)
- 7. In order for a party to be entitled to participate in a proceeding as an intervenor, it must have an interest in the outcome of the proceeding which is direct and substantial. An interest

which is merely political, which is anticipatory or speculative, or which is concerned with an indirect economic or commercial effect is not sufficient to entitle a party to participate. Nor is the fact that a decision in the proceeding may be used or referred to as a precedent in another proceeding. (See, *New Dominion Stores*, *supra*, at page 521; and more generally, *Re Schofield and Minister of Consumer and Commercial Affairs*, [1980] 28 O.R. (2d) 764 (Ontario Court of Appeal).)

- 8. It is generally not appropriate to permit an *amicus curiae* intervention unless the party seeking to intervene on that basis can demonstrate that its participation will provide a real and substantial input on important material issues which the Board is unlikely to receive from the direct parties, and that the participation of such an intervenor will not cause undue delay, or prejudice to a direct party.
- 9. In this case, the Board was satisfied that the IBEW EPSCCO and all of the IBEW Local Unions have a direct and substantial interest because the primary matter in issue concerns an alleged transfer of work jurisdiction from Local 1788 to the other IBEW Local Unions, all of which are constituents of the IBEW EPSCCO, and because they are bound by the Generation Projects Agreement. The EPSCA and Ontario Hydro are bound by both the Generation Projects Agreement and the Transmisson Agreement which may be affected by the result herein and as such are entitled to participate.
- 10. On the other hand, this application has nothing to do with the ICI sector of the construction industry, and will at best have only a remote indirect impact on the Provincial Line Work Agreement. Accordingly, neither the IBEW CCO nor the ECAO has any direct or substantial interest in this proceeding. Nor was the Board persuaded that either the IBEW CCO or the ECAO could provide any input or assistance which would not be forthcoming from one of the other parties, or that it was otherwise desirable to allow either of them to participate on an *amicus curiae* basis.
- 11. After the decision issued, Local 1788, accepting what it could fairly have considered to be an implicit invitation in the Board's April 13, 1994 decision to do so, withdrew its allegation that the International has violated section 73(2) of the Act, amended paragraph 4 of its Schedule "A" request for relief accordingly, and submitted that the IBEW EPSCCO, the various IBEW Local Unions, the EPSCA and Ontario Hydro no longer had any direct interest in the application sufficient to entitle them to intervene, and that their interventions should therefor be dismissed.
- 12. Upon considering the representations of the parties in that respect, the Board ruled, orally, that it was not persuaded that it was appropriate to alter the April 13, 1994 decision with respect to the standing issues, notwithstanding Local 1788's amendment of its application.

III Scheduling Concerns

13. Messrs. Richmond, Minsky and McKee (counsel for Local 1788, the IBEW - EPSCCO and IBEW Local Unions other than 353 and 1788, and the International, respectively), then requested that certain of the hearing dates which had been scheduled be adjourned. Because the panel was aware that there had been an administrative decision made to expedite the hearing of this application, that hearings and other matters had been cancelled to accommodate an expedited hearing of the application, that there had been discussions between counsel and the Registrar's office with respect to the scheduling of the application of which the panel had little knowledge, and because of the possible problems or ramifications on the scheduling of both this and other matters, the panel directed that counsel deal with the Registrar with respect to their adjournment requests in the first instance. When counsel did so, they were apparently advised that the hearing of this matter would proceed on the days scheduled.

- 14. Of course, such an administrative decision can always be raised with the panel seized with a matter for adjudicative determination of an adjournment issue. While it is appropriate for a hearing panel to consider the administrative decision as a factor when dealing with a request for an adjournment made directly to the panel, the panel is not bound by such an administrative decision. In this case, when the hearing reconvened, Mr. Richmond requested an adjournment of the April 21, 1994 hearing date. The panel advised the parties that everyone else who had an adjournment request should make it then as well. Mr. Minsky requested an adjournment of a later date. Mr. McKee made no adjournment request to the panel.
- 15. The Board granted Mr. Richmond's request for an adjournment. In all of the circumstances, including the consent of all the other parties, and because it appeared (at the time) that the adjournment requested would not result in any undue delay in the hearing, the Board considered that the adjournment requested should be granted.
- 16. However, the Board denied Mr. Minsky's adjournment request. Although the request was not opposed, Mr. Minsky conceded that the difficulties which prompted his request were not insurmountable. Accordingly, and having regard to the nature of the proceeding and its scheduling history, the Board concluded that the matter should not be adjourned merely for the convenience of counsel or one of his clients with respect to another, unrelated proceeding (see *Re Flamboro Downs Holdings Ltd. and Teamsters' Local 1879*, [1979] 24 O.R. (2d) 400 (Ontario Div. Court)).
- 17. Subsequent hearing dates were scheduled on agreement of the parties.

IV Order of Procedure

- 18. The parties were unable to agree on the order of procedure. Upon considering the representations of the parties in that respect, the Board ruled, in a decision issued on April 21, 1994, that the parties would be heard in the following order:
 - i) the applicant International Brotherhood of Electrical Workers, Local Union 1788;
 - ii) the intervenor International Brotherhood of Electrical Workers, Local Union 353;
 - iii) the intervenors Electrical Power Systems Construction Association and Ontario Hydro;
 - iv) the responding party International Brotherhood of Electrical Workers;
 - v) the intervenors the IBEW EPSCCO and IBEW local unions 105, 115, 120, 303, 402, 530, 586, 773, 804, 894, 1687 and 1739;
 - vi) the applicant Local 1788 in reply.
- 19. The Board further ruled that argument would follow the same order.
- 20. Although a significant part of the parties' submissions with respect to what the order of proceedings focused on the issue of onus, the Board's determination of the order of proceeding did not include a determination of where the onus in this case lies. Nor was it intended to suggest that Local 1788, which was directed to proceed first, bears the entire onus of proof in this case.

This being a case of first impression (being the first application filed under a Bill 80 provision which proceeded to litigation), the Board did not find it appropriate to finally determine where the onus in this case lay at that early stage of the proceeding. Nevertheless, the nature of the issues in this case, as raised in the pleadings, suggested that there may well be a mixed onus in this case, and that it would be convenient and probably expeditious to have Local 1788 proceed first. In the circumstances, and because it is generally appropriate to require an applicant to proceed first unless there is a statutory direction or practical reason to proceed otherwise, the Board ruled that Local 1788 should proceed first. The balance of the order of proceeding followed naturally once the Board determined who would proceed first.

V The Question and The Answer

- 22. The question in this case is in two parts and comes down to this: How has the International altered Local 1788's jurisdiction, and did the International have just cause to make that alteration?
- 23. In the interests of issuing a decision in this matter without further delay, we do not intend to attempt to review the extensive evidence or comprehensive representations of the parties. We find it unnecessary to do so. Having carefully considered the evidence and the representations of the parties, the Board is satisfied that the International has altered the jurisdiction of Local 1788 as alleged, but that it had just cause to do so.

VI The Bare Facts

The International is the "parent" and source of jurisdiction for all IBEW local unions, and specifically the fourteen IBEW Local Unions involved in this case. The activities of the International and the relationship between the International and the IBEW Local Unions are governed by the International's Constitution. Over the years since the late 19th century, the International has chartered various Locals with various geographic and work jurisdictions. In 1952, there were thirteen IBEW Locals in the construction industry in Ontario. These Locals had given and continue to have their own distinct geographic jurisdictions within the province. On August 20, 1952, the International, acting under the IBEW Constitution as it then was, granted the Charter which constitutes Local 1788. By the terms of that Charter, Local 1788 was granted the jurisdiction which was to be defined in its by-laws, as approved by the International. In that respect, the relationship between the International and its Local Unions is governed by the provisions of the Constitution, of which articles IV, XIV, XVI, XVII, XVIII and XXVIII are particularly applicable in this case. Article XVI empowers local unions to make their own by-laws and rules, but precludes by-laws or rules which conflict with the Constitution, and specifically provides that:

"all by-laws, amendments and rules, all agreements, *jurisdiction*, etc., of any kind or nature shall be submitted... to the [International President] for approval"

(emphasis added)

That is, all matters of Local Union jurisdiction, whether contained in by-laws or otherwise are subject to the approval of the International in the person of the International President. Further, articles XIV Sec. 2 and XXVII Sec. 3 respectively, provide as follows:

ARTICLE XIV

Sec. 2. The type of work and the territory or jurisdiction covered by a charter must be defined in approved local union bylaws. The I.P. has the right and power to divide or change the territory or jurisdiction covered by any L.U., or to take charge of and direct certain jobs or projects in or passing through any territory, when in the judgment of the I.P. such should be done.

ARTICLE XXVII

Sec. 3. Keeping in mind progress for the I.B.E.W., and that all electrical work be done by its members, it is impractical to classify or divide jurisdiction of work in every detail between the various branches in this organization to meet all situations in all localities. Therefore, the classifications and divisions outlined below are necessarily of a general nature, and L.U.'s whose jurisdiction with other L.U.'s of the I.B.E.W., or whose agreements are harmonious and conducive to the progress of the I.B.E.W., shall not be disturbed. But when harmony and progress do not prevail, or when disputes arise, the I.P. shall determine what L.U. will do certain work or jobs, consistent with the progress and best interests of the I.B.E.W. in obtaining and controlling the work in question.

(emphasis added)

25. It is common ground between the parties that Local 1788 was chartered as a province-wide electrical construction Local Union for Ontario Hydro employees. This is reflected in its original by-law which provided that:

ARTICLE I

Name - Jurisdiction - Objects

Sec. 1. This organization shall be known as Local Union No. 1788 of the International Brotherhood of Electrical Workers, Toronto, Ontario. Local 1788 shall have jurisdiction over all Outside and Inside electrical work as defined in Article XXVIII, Sec. 4 and 5 of the Constitution when performed by employees of the Hydro Electric Power Commission of Ontario.

However, the right of the International Office to change this jurisdiction is recognized, as provided in the IBEW Constitution.

(emphasis added)

The reference in the by-laws to "Outside and Inside electrical work" was and is specifically referred to in the International Constitution.

26. Over the years, Local 1788's by-laws were amended many times, sometimes at its request and sometimes initiated by the International. With the exception of changes made in November 1971, March 1989 and June 1993 (the latter being the change in issue herein), these changes were technical, cosmetic, or otherwise had nothing to do with Local 1788's jurisdiction as such. In addition to the original version as aforesaid, Article I of Local 1788's by-laws is the significant provision in that respect. Prior to the change in 1989, article I variously read as follows:

ARTICLE I

Name - Jurisdiction - Objects

Sec. 1. This organization shall be known as Local Union No. 1788 of the International Brotherhood of Electrical Workers, Toronto, Ontario. Local 1788 shall have jurisdiction over all Outside and Inside electrical work as defined in Article XXVIII, Sec. 4 and 5 of the Constitution when performed by employees of the Hydro Electric Power Commission of Ontario.

However, the right of the International Office to change this jurisdiction is recognized, as provided in the IBEW Constitution."

Approved July 30, 1953

ARTICLE I

Name - Jurisdiction - Objects

Sec. 1. This organization shall be known as Local Union No. 1788 of the International Brotherhood of Electrical Workers, Toronto, Ontario, Canada. Local No. 1788 shall have jurisdiction over all Outside and Inside electrical work as defined in Article XXVIII, Sec. 4 and 5 of the IBEW Constitution when *performed by employees of Ontario Hydro*.

However, the right of the International Office to change this jurisdiction is recognized, as provided in the IBEW Constitution."

Approved June 17, 1974

(emphasis added)

27. Prior to the 1974 by-law adjustment, on November 23, 1971, the International President authorized a transfer from the International to Local 1788 of:

"jurisdiction, including all rights, privileges, and duties under the *Ontario Labour Relations Act* or otherwise which the International Brotherhood of Electrical Workers has by reason of it being the bargaining agent for those employees of the construction field forces of [Ontario Hydro] coming within the... bargaining unit [described in its current collective agreement]."

28. Ontario Hydro, which wanted to bargain with all construction trades through the EPSCA as its representative, and preferably with the trades being represented by a council of trade unions, opposed this move. Accordingly, Local 1788 brought an application to the Board under section 68 (formerly section 63 - section 54 at the time of the application for a successor rights declaration) (Board File No. 1604-81-R) The International supported the application. Ontario Hydro opposed it. On June 22, 1972, the Board allowed the application and declared that:

"the applicant [Local 1788] by reason of a merger, amalgamation or a transfer of jurisdiction has acquired the rights, privileges and duties of International Brotherhood of Electrical Workers, which was the bargaining agent for a unit of employees of the respondent defined in a collective agreement between the Hydro-Electric Power Commission of Ontario and the International Brotherhood of Electrical Workers, effective July 17, 1970 until July 16, 1971, and from year-to-year thereafter subject to notice."

- Accordingly, it appears that until 1972 it was the International which held bargaining rights for construction electricians employed by Ontario Hydro. It was then that the International decided to get out of the representation business (except as required by law) and tried to transfer its bargaining rights, in this case to Local 1788, which led to the Board proceedings as aforesaid. It appears that it was as a result of those Board proceedings that Local 1788 first obtained bargaining rights and that these bargaining rights were limited to employees of Ontario Hydro. There is no suggestion that Local 1788 held bargaining rights for the employees of any employer other than Ontario Hydro prior to 1980 and the first Transmission Agreement.
- 30. The first Generation Projects Agreement was signed in 1980. It appears that the first Transmission Agreement became effective that same year. Prior to 1980, Ontario Hydro did most of its own transmission system work utilizing its own employees, who, on the evidence before the Board in this proceeding, were members of Local 1788. On those occasions when work was contracted out, whether at generation stations or on the transmission systems, it was performed by members of the IBEW Local Union with jurisdiction in the geographic area in which the work was located under the applicable local construction agreement, or under what is commonly known as "Form B". In 1979 and 1980, the fourteen IBEW construction Local Unions, including Local 1788, engaged in extensive internal debate within the IBEW EPSCCO, over how the bargaining rela-

tionship with Ontario Hydro and the EPSCA and Local Union jurisdiction should be structured. On the evidence, it is apparent that even at that early stage the rift which is at the root of the dispute in this case was present and developing between Local 1788 and the other IBEW Local Unions. Indeed, as early as October 1980, there was a question, raised by the then Canadian International Vice-President, Ken Rose, with respect to Local 1788's place in the IBEW - EPSCCO and whether all bargaining rights with the EPSCA should be turned over to Local 1788, a suggestion with which the other IBEW Local Unions clearly did not agree. Local 1788's position at the time as expressed by (Hank Schueler, its representative) at an IBEW - EPSCCO meeting in November 1980 as follows:

Bro. Schueler

"If we go on our own it will be only for 1788 employees unless Brother Rose decides otherwise. He has said that if you fellows don't want this kind of an arrangement then that may be an alternative. My viewpoint is that all locals should be involved. We are dealing with an employer as well as an owner and they are different from the contractors you are used to dealing with. We want to change in the way of adding some things and I hope we can do what's best for all concerned. If we fight among ourselves then Hydro will be the only winner. If we can achieve one agreement we will at least then be fighting who we should be and not ourselves. Whatever happens down the road within the I.B.E.W. is their decision to make. As I said before, this agreement is not final. We will look at some of your questions like the hiring hall and try to make more improvements."

Bro. Schueler

I would like to say that if our local supplies men to contractors at the Atikocan site we will call your hall for men. If this becomes a problem I hope we can settle it among ourselves. We will try to work with you if this should happen.

Bro. Popovich

"I don't think 1788 will supply men to contractors."

Bro. Schueler

"We don't want to but if Brother Rose says we have to then he will make that decision. Years ago we supplied men to line contractors here in Toronto, then the International changed our jurisdiction and they could change it again." [sic]

At the same meeting, others commented as follows:

Bro. McKenzie "It's okay for you guys who have no projects in your area to sit there and say let L.U. 1788 handle it. What you have to realize is that if we go that way all the contractors working on those sites will phone L.U. 1788 for men and we get nothing. That's fine for you to say give it all away."

Bro. Fraser

"We always supplied men to contractors who worked for Hydro. When has L.U. 1788 supplied men to Contractors?"

Bro. Tersigni

"You are no longer dealing with Hydro. Hydro has turned their bargaining rights over to E.P.S.C.A. If L.U. 1788 signs an agreement for the power sector it will be with E.P.S.C.A. not Hydro. That's the difference that makes this situation different then it has ever been in the past. The right of our local unions to continue to supply men to contractors has got to be protected.

Bro. Rose

"If L.U. 1788 signs an agreement with E.P.S.C.A. it can be for all work performed or subcontracted on their sites. That is the position they have put us in."

Bro. Popovich

"Would it be possible to put this agreement on the back burner and explore an alternative with the E.C.A.O. We should have some meeting with them and maybe consult our lawyers to get some ideas. L.U. 1788 can go ahead and sign an agreement with Hydro.

Bro. Tersigni

"Local Union 1788, as I understand the management constitution of E.P.S.C.A. can

not sign an agreement with Ontario Hydro. Ontario Hydro has surrendered their bargaining rights to E.P.S.C.A. which means L.U. 1788 would have to sign the agreement with E.P.S.C.A. The constitution of E.P.S.C.A. includes our contractors as well as Ontario Hydro as a Contractor and this was pointed out to L.U. 1788 in a document from our lawyers when they sought their advice. The document also pointed out that L.U. 1788 could supply men to contractors and likewise other locals could supply men to Ontario Hydro. As Brother Rose points out management is coming at us from one legal bargaining group who represent all Employers."

Bro. Schueler

"What Brother Tersigni has said is correct by law. If you ask Koskie; and we did, he will tell you that Hydro has surrendered their bargaining rights to the E.P.S.C.A. Association. Under successors rights we can sign an agreement with E.P.S.C.A. We could sign a letter saying we would let you continue to supply men to contractors under our agreement. I think we should get back to the bylaws and try to get through them."

- As it turned out, the IBEW EPSCCO bargained the Generation Projects Agreement with the EPSCA, although Local 1788 dominated the bargaining from the IBEW side. EPSCA Local 1788 alone bargained the Transmission Agreement with the EPSCA. Under the terms of the Generation Projects Agreement, all work done under it by direct employees of Ontario Hydro was to be performed by members of Local 1788. Work done under that collective agreement by contractors other than Ontario Hydro was to be performed by members of the Local Union with the geographic jurisdiction over the area in which the work was located. Under the Transmission Agreement, Local 1788 was the sole IBEW entity entitled to perform "all construction industry work performed in the Province of Ontario on Ontario Hydro property for the Transmission Systems Division of the Ontario Hydro" (as the latter was defined within the agreement). In the 1980's, all or virtually all transmission systems work covered by the Transmission Agreement was performed by Ontario Hydro using its own employees. The evidence indicates, and indeed the parties agreed, that from 1986 on, all transmission work (other than on miscellaneous hydraulic projects) performed by contractors working under the Transmission Agreement in effect at the time was assigned to members of Local 1788, and was performed by members of Local 1788 or members of other IBEW Local Unions cleared through and by Local 1788.
- 32. It appears that after this debate within the IBEW EPSCCO there continued to be some question concerning the extent of Local 1788's jurisdiction under the Transmission Agreement (then and sometimes still referred to as the Lines and Stations Agreement), but that Local 1788, with the apparent, but not the actual, approval of the International in the person of International Vice-President Rose, took the position that it had jurisdiction over *all* such work, regardless of the employer which performed it.
- Of course, the early to mid 1980's was a time of relative prosperity in the electrical power systems sector. Construction activity on Ontario Hydro property was at a peak and there was full employment within the IBEW construction Local Unions. Indeed, some Local Unions had to actively solicit new members in order to fulfil their obligations to supply employers. As a practical matter, the jurisdictional debate within the IBEW abated, but it did not die.
- As construction activity began to slow down, the other IBEW Local Unions again began to examine Local 1788's activity more carefully. In May 1987, for example, Local 586 (Ottawa) raised a question with respect to work contracted out by Ontario Hydro. International Vice-President Rose responded by stating that Local 1788's jurisdiction ". . . extended only to those employees of Ontario Hydro, and such jurisdiction does not extend to any electrical contractor in the private sector." Rose went on to say that correspondence in 1981 (which appeared on its face to suggest otherwise) referred only to Hydro employees in the electrical power systems sector.

35. In late October 1987, Local 105 (Hamilton) raised the same issue. By this time, Ken Woods had replaced Rose as Canadian International Vice-President. In a letter dated November 10, 1987 Woods responded to Local 105's question as follows:

This will acknowledge receipt of your correspondence dated October 30, 1987 in which you raised the question of work assignment relative to the supply and installation of one (1) 230 KV Pipe Type Cable Circuit in Hamilton, Ontario.

A review of files in this office clearly indicates that several years ago, (1980-81) when the EPSCA Transmission Line Agreement was being negotiated the construction Local Unions in the Province showed little, or, no interest in becoming involved in negotiations for work performed through the EPSCA of Ontario for Transmission Line work. Consequently, Local Union 1788 was granted permission to undertake those negotiations, and that situation is ongoing at this time, with the agreement for the work in question being between EPSCA and Local Union 1788.

In view of the fact Local Union 1788 is a Provincial Local Union and in a position to properly police the work in question; unless I receive compelling information to the contrary, I see no need to alter that situation.

Local 105 did not accept this response, and raised its concerns with the IBEW - EPSCCO. Woods maintained his position, but so far as Local 105 and the other members of the IBEW - EPSCCO (other than Local 1788) were concerned, the issue had not been resolved.

36. It appears that Local 1788 was also concerned that the question of which Local Union had the right to supply contractors of Ontario Hydro under the Transmission Agreement remained open. On July 14, 1988, Local 1788 wrote to Woods as follows:

As we now have our Lines and Stations Agreement finalized, I am writing to request the appropriate by-law change(s) to accommodate the parameters of our jurisdiction. In specific, a change to reflect the existing practice regarding contractors under the E.P.S.C.A., L.U. 1788 Collective Agreement.

(emphasis added)

Woods responded to Local 1788 by letter dated August 18, 1988 as follows:

This will acknowledge receipt of correspondence dated July 14, 1988 over the signature of Local Union 1788 President Brother Sprackett, in which Brother Sprackett requested a Bylaw change to encompass EPSCA Contractors in the jurisdiction of Local Union 1788.

As you are aware, Local Union 1788 was Chartered to have jurisdiction over members employed directly by Ontario Hydro, and the Local Union Bylaws so indicate.

You are also aware that all Construction Local Unions in this Province have Inside and Outside jurisdiction over all work performed by Contractors, thus posing a conflict between defined jurisdiction and the existing practice relative to EPSCA Contractors involved in Lines and Stations Work [ie. transmission systems].

This office is in receipt of correspondence from several of the Construction Local Unions expressing their concern and displeasure over the existing EPSCA Contractors arrangement for Lines and Stations Work.

The crux of the problem for some of the Local Unions revolves around the fact that in some cases where a Contractor working within a Local Union jurisdiction employs members from that Local Union, only the total amount of 1788's Health-Welfare and Pension contributions and per capita portion only of dues is reciprocated to the Local Union in whose territorial jurisdiction the work is being performed. Thus leaving the Local Union with men working in their "Home" jurisdiction with a short-fall in contributions to the various plans.

Therefore, in order to address the issues raised by the other Local Unions, I would like to discuss this matter further with those concerned.

Please contact the writer for a mutually agreeable time to discuss the matter.

- 37. It is not entirely clear what "discussions" did in fact take place, although it is apparent that there were discussions, both at the IBEW EPSCCO and otherwise, about Local 1788's request for an alteration to its jurisdiction. However, at least three things are clear:
 - (1) that Woods did not fully understand the nature of the dispute, what Local 1788 was seeking, the history of the situation, or the impact of the change being sought would have on the other IBEW construction Local Unions;
 - (2) the other Local Unions did not fully understand the intent or implications of Local 1788's request;
 - (3) the other Local Unions would have opposed it had they perceived Local 1788's request to be what it in fact was; that is, an attempt by Local 1788 to consolidate an expansion which it had managed to obtain in bargaining.
- 38. In any event, on March 17, 1989, Woods advised Local 1788 that he had recommended to the International that Article 1, section 1 of Local 1788's by-laws be amended to grant the jurisdictional change requested (which he had done on February 17, 1989) as follows:

ARTICLE I

Name - Jurisdiction - Objects

Sec. 1. This Organization shall be known as Local Union 1788 of the International Brotherhood of Electrical Workers Toronto, Ontario, Canada. Local 1788 shall have jurisdiction over all Outside and Inside work, as defined in Article XXVIII, Section(s) 4 and 5 of the IBEW Constitution, when performed by employees of Ontario Hydro, and all Outside and Inside work done by the Electric Power Systems Construction Association (EPSCA) on Ontario Hydro property for the transmission systems and miscellaneous hydraulic projects of Ontario Hydro.

(emphasis added)

- 39. On March 3, 1989 this amendment had been approved by International President J. J. Barry (who is still the International President) acting upon the recommendation of International Vice-President Woods following from the latter's discussion with Local 1788 and at the IBEW-EPSCCO as aforesaid.
- 40. The term "miscellaneous hydraulic project" is a defined term under the Transmission Agreement as follows:

A "miscellaneous hydraulic project" is any hydraulic work undertaken by Ontario Hydro which will require less than one year to complete and comprise a total employers' workforce of not more than 100 employees at one time.

This term, and the concerns with it, has it origins in 1985 when the International and various Locals became concerned about the performance of work on small projects in remote areas in Northern Ontario. Such work appears to fall within the scope of the work covered by the Generation Projects Agreements in effect between 1980 and April, 1986. The nature and location of such projects were such that the only IBEW Local Union which might reasonably have become aware

of them in the absence of formal notice, or who would be physically able to supply members to do the work, was Local 1788, as a result of having Local 1788 crews working for Ontario Hydro on the associated or nearby transmissions systems projects. The International was concerned that this work could be assigned to non-IBEW electricians and, as far as the International knew in 1985, all such work was being performed by direct employees of Ontario Hydro. Further, even John Sprackett, Business Manager of Local 1788, testified that the contracting out of work by Hydro "wasn't an issue because no one thought much work would be contracted out."

- 41. It was determined to be appropriate to address these projects, called "miscellaneous projects" at the time, in the 1986 to 1988 Generation Projects and Transmission Agreements. In the result, it was agreed with the EPSCA that "any work performed by Ontario Hydro on a miscellaneous project" was excluded from the scope of the Generation Projects Agreement. On the other hand, the Transmission Agreement between the EPSCCO and Local 1788 was amended to include ". . . all construction industry work performed in the Province of Ontario on Ontario Hydro property for the Transmission Systems Division and miscellaneous projects of Ontario Hydro." A miscellaneous project was defined in the same way as a miscellaneous hydraulic project is now defined with the exception that it was not limited to hydraulic work.
- 42. The term miscellaneous project disappeared and was replaced by "miscellaneous hydraulic project" in the 1988 to 1990 Generation Projects and Transmission Agreements, and continued through in the 1992 to 1995 agreements.
- 43. It does not appear that any of this was any secret. The IBEW EPSCCO and all of its constituent IBEW Local Unions were party to the Generation Projects Agreement negotiations and must have known that work (that is, miscellaneous projects, subsequently miscellaneous hydraulic projects) which had been covered under that agreement was being removed from it and placed under the Transmission Agreement. The International knew because it was its concern which led to this in the first place, and it is its responsibility to vet and approve all collective agreements, including these two. While it is clear that they knew or ought to have known this, these changes were presented by Local 1788 as "housekeeping" and it is apparent that the International and the other Local Unions did not appreciate the implications of these changes.
- 44. By 1991, there had been a significant decline in the electrical construction work in the electrical power sector. In May 1992, the IBEW's internal jurisdictional dispute came to a head.
- 45. By 1991, the downturn in Hydro's construction activity was being felt more acutely, and was manifesting itself in unemployment within the IBEW Local Unions. At the same time, it appears that Ontario Hydro began to contract out more of its miscellaneous hydraulic projects work. The issue crystallized at the Sir Adam Beck Generating Station where work declared to be a miscellaneous hydraulic project was contracted to Ravine Construction Ltd. The electrical work involved was contracted to Ontario Electric Construction Co. Ltd. Both Local 303 (St. Catharines) and Local 1788 claimed the right to supply electricians to Ontario Electric in that respect. The EPSCA adopted the position that the work should be assigned to Local 1788. Collective bargaining with the EPSCA was ongoing at the time.
- 46. By letter dated May 8, 1992, the International advised Ontario Electric that the work in question was in Local 303's jurisdiction. By letter to Local 1788 dated May 29, 1992, the International, in the person of International Vice-President Woods, confirmed its position as follows:

In furtherance to our discussions relative to the above captioned matter, this will confirm the writer's position that work performed for Ontario Hydro by electrical contractors is the work of members of the Local Union in whose territorial jurisdiction that work is performed.

Further, as discussed with yourself and the Business Managers from the IBEW-CCO, IBEW jurisdiction is not subject to negotiation and is determined by the International President.

Notwithstanding the foregoing, it is obvious there is a potential encroachment on the inside jurisdiction of the thirteen (13) IBEW Inside Locals in Ontario, and in fact at present there is a violation of the inside jurisdiction of Local Union 303 at the job at Sir Adam Beck.

That encroachment is brought about by the language in the various collective agreements; (1) between EPSCA and the IBEW EPSCCO which "excludes work done by Ontario Hydro on a Miscellaneous Hydro Projects" by that exclusion the work flows to the agreement (2) covering Transmissions Systems Work, which the thirteen Construction Local Unions are not a party to.

Such encroachment of jurisdiction has to be rectified immediately, therefore, by copy of this correspondence Representative C. McKenzie is being advised of the problem, and assigned to ensure the language in the agreement(s) is modified to reflect the actual jurisdiction of all Local Unions concerned.

- 47. Although the letter itself is somewhat obscure, the message was clear: the International's position was that Local 1788's jurisdiction was limited to direct employees of Ontario Hydro and it intended to take steps to have the language in the Generation Projects and Transmission Agreements modified to reflect this view.
- 48. At the same time, Woods assigned an International Representative, Charles McKenzie, "to take the necessary action, short of making it a strike issue, to have that situation rectified." The modifications McKenzie was to try to have incorporated in the agreements were as follows:

Section 2. Scope of Agreement

200A. Change 2nd sentence to read:

"This work includes the building of generating stations, hydraulic works, heavy water facilities, microwave and repeater stations, and any work performed for Ontario Hydro on a miscellaneous hydraulic project, but excludes the building of commercial type of office facilities at urban location remote from operating facilities."

Section 8. Hours of Work

800B. Change to read:

A. Miscellaneous project is any work undertaken for Ontario Hydro which will require less than one year to complete and comprise a total employer's work force of not more than one hundred employees at one time. When such work is performed by Ontario Hydro it shall be the work of Local Union 1788 IBEW and when such work is done by an Electrical Contractor it shall be the work of the Local Union in the territorial jurisdiction as awarded by the International President and as set out in the approved Bylaws of the respective Local Union.

Section 2. Scope of Agreement

200A. Amend to read:

EPSCA recognizes the Union as the exclusive bargaining agency for a bargaining unit as defined in Item B. engaged in all construction industry work performed in the Province of Ontario by Ontario Hydro on Ontario Hydro property for the transmission systems, division and by Ontario Hydro on miscellaneous hydraulic projects for Ontario Hydro. When such work is done by an Electrical Contractor it shall be the work of the Local Union in the territorial jurisdiction as awarded by the International President and as set out in the approved Bylaws of the respective Local Union.

(emphasis added)

- 49. McKenzie attended at the negotiations and told the IBEW representatives, and specifically Local 1788, that they were to have the collective agreements changed to include these provisions, and that if they refused or failed to do so, the International would exercise its authority to do so itself.
- 50. Woods' initiative in this respect was prompted by complaints from the IBEW EPSCCO and IBEW Local Unions (other than Local 353), and some contractors. The other IBEW local unions wanted to supply electricians to Ontario Hydro's contractors, and some contractors had expressed the desire that they do so. When the issue crystallized at the Sir Adam Beck job, Local 804 (Kitchener) specifically requested that the International intervene and resolve the dispute.
- Negotiations with the EPSCA continued. They concluded when, on June 18, 1992, the 1992-1995 Transmission Agreement was settled by the execution of a Statement of Settlement which was ratified on July 17, 1992. On September 9, 1992, the 1992-1995 Generation Projects Agreement was settled by a Statement of Settlement ratified on October 9, 1992. On December 14, 1992, the Transmission Agreement in its present form (which incorporates the Statement of Settlement and the preceding collective agreement) was executed. On June 4, 1993, the Generation Projects Agreement in its present form (incorporating the Statement of Settlement and preceding collective agreement) was executed. The collective agreements which were negotiated and ratified did not include the changes which the International had instructed the IBEW representatives to include in them as aforesaid.
- The dispute concerning the jurisdiction to supply contractors continued into 1993. Locals 773 and 804 wrote to the IBEW EPSCCO demanding that the issue be resolved. The IBEW EPSCCO passed this correspondence on to Woods. By letter dated February 8, 1993, McKenzie reported to Woods that the issue remained unresolved and that Local 1788 refused to implement the changes to the collective agreement as directed. At a meeting of February 22, 1993, and subsequently by letter dated March 15, 1993, Local 1788 presented its side of the story to Woods and maintained its objection to the changes to the collective agreements and its jurisdiction which had been directed.
- 53. The International was unmoved by Local 1788's representations. By fax dated April 5, 1993, Woods advised the EPSCA to ensure that work done for Ontario Hydro by contractors was assigned to the IBEW Local Union in whose geographic jurisdiction the project was located, not to Local 1788. By fax dated April 23, 1993, Woods wrote to Local 1788 stating, in part, as follows:

As noted above, this correspondence is [sic] no way, implicity or explicitly, recognizes the jurisdictional claim of Local Union 1788 over work performed for Ontario Hydro by private contractors, that work is clearly the work of the Local Union in whose territorial jurisdiction such work is being performed.

Further, in accordance with the instructions given at the meeting of IBEW Business Managers including yourself, held on March 23, 1993, you are to cooperate with the IBEW and those Business Managers in making the necessary amendments to the Collective Agreement(s) involved in order that the negotiated jurisdiction over private sector work is determined to be that of the thirteen IBEW Construction Local Unions in the Province of Ontario in compliance with that jurisdiction awarded by the International President.

Please be governed accordingly.

54. In addition, the IBEW Locals (other than Local 353) continued to protest to the International that Local 1788 should not be the Local supplying electricians to contractors performing work for Ontario Hydro under the Transmission Agreement. This internal jurisdictional dispute

was also addressed by Woods. In a letter dated May 5, 1993 to International President Barry, Woods recommended that Local 1788's jurisdictional by-law be amended to restrict its jurisdiction to direct employees of Ontario Hydro as follows:

Local Union 1788 was originally chartered to do all construction work performed by their members employed by Ontario Hydro. That jurisdiction was subsequently amended to include work on transmission systems and miscellaneous hydraulic projects of Ontario Hydro. In view of the fact there are thirteen construction locals in the Province of Ontario with jurisdiction over all construction work performed in their respective jurisdiction when performed by contractors in the private sector, there was actually a hybrid type of jurisdictional assignment in this Province. However, at *no* time was it ever considered by the writer that Local Union 1788 had jurisdiction over work contracted out to the private sector when not done by employees of Ontario Hydro.

Approximately one-year ago it came to the writers' attention there was an overlap of jurisdiction between the above captioned Local Union [1788] and the thirteen construction locals of the IBEW in the Province of Ontario. That problem arose through negotiations of two agreements covering work done by or for Ontario Hydro, i.e., a Generation Projects Agreement and a Transmission Systems Agreement, see attached "A", dated May 29, 1992, last para, first page.

Subsequent negotiations have not resulted in rectification of that problem, to the contrary, not-withstanding my directive to Sprackett, the Business Manager of Local Union 1788 to clean the situation up during negotiations, he has actually solidified that Local Unions' hold over Miscellaneous Hydraulic Projects work when done by "private" sector contractors.

That has lead to a deluge of phone calls from electrical contractors complaining bitterly of two things, (1) they don't want to use Local Union 1788 men, and (2) Local Union 1788 won't let the contractor take one man into the jurisdiction to look after his interests, (see B attached).

The reasons for (1) above, is that the members of Local Union 1788 have worked almost exclusively on Nuclear/Steam Generating Plants and have little experience in the "real" world, in that regard, in a call from the Electrical Contractors Association of Ontario the writer was advised that if they had to use 1788 members they might just as well get "aids".

We have enclosed copies of miscellaneous correspondence relative to this issue for your reference and information.

It is obvious that in addition to the two (2) collective agreements being modified by the International President in accordance with our Constitution, so do the Local Union Bylaws.

We therefore recommend that 1788 Bylaws be amended as per the following.

Article I In the last line of Section I, after ——projects of Ontario Hydro, add the following:-

Hydro, when such work is not contracted out to an electrical contractor.

In view of Local Union 1788 support for Bill 80, i.e., amendments to the Ontario Labour Relations Act which would prohibit an International Union from changing jurisdiction, be it work, sector or territorial, from what it was on May 2, 1992 without consent of the Local Union, the local will probably appeal this amendment to all who will listen in this Province. In that regard, everyone involved in the fight against Bill 80 wondered why the magic date of May 1, 1992 relative to jurisdictional changes in the proposed legislation, the foregoing may be coincidental, however, I doubt it.

Notwithstanding the fact Bill 80 is still not law, the matter of changing the jurisdiction may be challenged under existing sections of the Labour Relations Act. If that occurs I recommend that we obtain the services of a Labour Lawyer, and suggest Koskie & Minsky.

Should you have any questions or require more information please feel free to contact the writer.

[sic]

55. Under cover of letter dated May 14, 1993, Woods sent a copy of what has come to be known as the "Knight-Woods letter" to Local 1788, and instructed Local 1788 to act in accordance with it. The Knight-Woods letter reads as follows:

JURISDICTION - MISCELLANEOUS HYDRAULIC PROJECTS

Further to your letters of April 27 and May 5, 1993, this agreement is to confirm the interpretation of the Recognition Clause in Section 2 of the IBEW-EPSCCO/EPSCA Collective Agreement.

The parties agree that the exclusion for "any work performed by Ontario Hydro on a Miscellaneous Hydraulic Project" applies only when International Brotherhood of Electrical Workers (IBEW) members are directly employed by Ontario Hydro.

Work by contractors on a Miscellaneous Hydraulic Project will be performed by IBEW members of the local in the area under the Project Agreement.

When Hydro uses its own forces to perform work on Miscellaneous Hydraulic Projects, the work will be done by Local 1788 under the Transmission Agreement.

Please sign and return a copy of this letter to confirm your agreement.

"J. G. Knight"	"K. Woods"	"R. Tersigni"
J. G. Knight	K. Woods	R. Tersigni
General Manager	Int'l Vice-	Exec. Secretary-
FPSCA	President IRFW	Treasurer IREW-EPSCCC

56. On June 7, 1993 Woods wrote to International President Barry enclosing a copy of the Knight-Woods letter and requesting that Local 1788's by-laws be amended to reflect the resulting change in its jurisdiction. On June 18, 1993, Woods wrote to Local 1788 advising that its by-laws had been reviewed and "corrections... made to reflect the proper work jurisdiction of the local union..." and enclosing a copy thereof as follows:

ARTICLE I

Name - Jurisdiction - Objects

Sec. 1. This Organization shall be known as Local Union 1788 of the International Brotherhood of Electrical Workers, Toronto, Ontario, Canada. Local 1788 shall have jurisdiction over Outside and Inside electrical work as defined in Article XXVII, Section 4 and 5 of the IBEW Constitution when performed by the employees of Ontario Hydro and all work done by the Electric Power Systems Construction Association (EPSCA) on Ontario Hydro property for the transmission systems and miscellaneous hydraulic projects of Ontario Hydro, when such work is not contracted out to an electrical contractor.

However, the right of the International President to change this jurisdiction is recognized, as provided in the IBEW Constitution.

(emphasis added)

57. In short, the International orchestrated a change to Local 1788's by-laws, and to the Generation Projects and Transmission Agreements, such that any jurisdiction with respect to contractors of Ontario Hydro which Local 1788 had achieved through practice or negotiations was removed from it and redistributed among the other thirteen IBEW construction Local Unions.

Local 1788 was restricted to representing direct employees of Ontario Hydro under both the Generation Projects Agreement and the Transmission Agreement.

58. Local 1788 continued to resist this change. By letter dated June 30, 1993, Local 1788 wrote to the EPSCA (Mr. Knight), the International (Woods) and the IBEW - EPSCCO (Tersigni) as follows:

Local 1788 has received a document dated May 6, 1993 signed by J.G. Knight, K. Woods and R. Tersigni, which attempts to remove Local 1788's jurisdiction over work on miscellaneous hydraulic projects when performed by subcontractors to Ontario Hydro, and to give that jurisdiction to other local unions of the IBEW.

We want all parties to clearly understand Local 1788's position concerning this document.

First of all, this document is a complete misstatement of reality. Since at least 1986, Local 1788's members and only Local 1788's members have performed work on miscellaneous hydraulic projects when that work was performed by either Ontario Hydro or subcontractors from Ontario. Ontario Hydro, the IBEW and IBEW-EPSCCO all know that this is the practice. The document, therefore, is false. The understanding of the parties is exactly the opposite of what the document claims the understanding to be.

Local 1788 takes the position that this document is in violation of the *Labour Relations Act*, as well as the Constitution of the International Brotherhood of Electrical Workers.

Signing this document and attempting to take away the jurisdiction of Local 1788 is contrary to Bill 80, which is presently before the Legislature, and which, when it becomes law, will be effective June 25, 1992. Under that law, any amendment to the jurisdiction of a Local Union done in a manner that the May 6 letter attempts to do is prohibited.

We view the action of EPSCA, IBEW and the Executive Secretary of the IBEW-EPSCCO as arbitrary, discriminatory and illegal. If any Local 1788 member or Local 1788 itself suffers any loss of work as a result of this activity, we will hold all three signing parties liable for damages. If any parties attempt to enforce this May 6, 1993 document, once Bill 80 becomes law, Local 1788 intends to commence proceedings at the Board against the signatories and the parties they represent in reliance on the provisions of Bill 80.

This is exactly the kind of arbitrary action exercised by international construction unions and assisted by compliant employers which Bill 80 is supposed to protect us against. We intend to use Bill 80.

We ask you to reconsider the May 6, 1993 document as it would have serious ramifications for all of us. We await your responses.

[sic]

In December 1993, Woods advised the EPSCA and Ontario Hydro of the changes to Local 1788's jurisdictional by-law, and specified that Local 1788's jurisdiction was limited to direct employees of Ontario Hydro and that contractors working under any collective agreement were to be supplied by the IBEW Local Union in whose territorial jurisdiction the work was located. However, Local 1788 filed this application, on March 7, 1994, which, pursuant to section 147(5) (then section 138(5)) meant that the alteration to Local 1788's jurisdiction was deemed not to have been made. Pursuant to this, Local 1788 secured the EPSCA's agreement to continue to recognize Local 1788 as having jurisdiction over all work, including work on miscellaneous hydraulic projects, under the Transmission Agreement, until such time as a change is required as a result of a Board decision or collective bargaining amendments.

VII The Change in Jurisdiction

- 60. Local 1788 asserts that the International has altered its jurisdiction in a manner contrary to section 147. It challenges both the process by which the change to its jurisdiction was made and the substance of the International's decision. Local 1788 submits that the process was unfair, dishonest and failed to take into account all relevant facts while taking into account irrelevant ones. It submits there was no cause, just or otherwise, to change its jurisdiction.
- 61. Virtually all events material to this case took place prior to December 14, 1993, when section 147 (then section 138.3) was proclaimed as part of Bill 80. While there was some suggestion that the Board should take this into consideration in dealing with this application, no one took the position either that section 147 is inapplicable, or that the Board otherwise has no jurisdiction to deal with this application on its merits.
- 62. On the evidence, the Board is satisfied that the International has purported to alter Local 1788's jurisdiction in two ways: (a) by removing its jurisdiction over line work covered by the Transmission Agreement by other than employees of Ontario Hydro; (b) by removing its jurisdiction over work performed by other than employees of Ontario Hydro in connection with miscellaneous hydraulic projects covered by the Transmission Agreement. In both cases, the work which the International has purported to remove from Local 1788's jurisdiction (that is, work contracted out by Hydro to other electrical contractors) would be redistributed among the other thirteen IBEW construction Local Unions in that the contractor performing the work supplied by the Local Union which has jurisdiction in the geographic area in which the work is being performed. In other words, Local 1788's loss is the other Local Unions' gain; or, to put it another way, the International has taken from Local 1788 and given to the other Locals.

VIII The Decision - The Process

- 63. We turn first to the process through which this re-distribution of jurisdiction was accomplished.
- With respect, the "process" which the International adopted, through the person of International Vice-President Woods, was less than optimal. It not only resulted in Woods obtaining information which was incomplete and sometimes incorrect, but also unduly delayed the disposition of the matter and itself became part of the problem. However, the International is a trade union, not a quasi-judicial body, and the defects in the procedure it adopted, although significant, are not necessarily fatal.
- 65. The International's Constitution gives the International President plenary jurisdiction and powers over many significant matters including the jurisdiction and activities of the Local Unions which the International has chartered. Specific to this application, the International President is empowered to divide or change the jurisdiction of Local Unions (article XIV, section 2), particularly "when harmony and progress do not prevail, or when disputes arise" in which case the International President is empowered to determine which local union will have jurisdiction over the work in issue "consistent with the progress and best interest of the IBEW in obtaining and controlling the work in question" (article XXVII, section 3).
- 66. In this case, the International President did not testify and there was no suggestion that there was anything which prevented him from doing so. Accordingly, Local 1788 was unable to cross-examine the International President on the correspondence which purports to be from him, or his "decision" with respect to the issues herein.

- 67. However, the International Constitution also provides, in article IV section 4, that: "the [International President] can, in any situation, delegate the powers of his office to an International Representative, Vice-President or Assistant." [sic]
- 68. On the evidence before the Board in this case, we are satisfied that the International President has effectively delegated his responsibilities under the constitution with respect to IBEW affairs in Ontario to the Canadian International Vice-President as s/he may be from time to time. although the International President has retained and exercised a limited supervisory role in that respect. Accordingly, and notwithstanding that the International President has on what appear to be rare occasions not accepted the recommendations of the Canadian International Vice-President, the Canadian International Vice-President has an effective power of recommendation such that for practical purposes, s/he is the decision-maker. Here, it is clear that the International President deferred entirely to Woods' assessment of the situation and his recommended solution. It is not apparent that the International President made any independent assessment or decision. In effect, he "rubber stamped" Woods' decision. That is, in this case, it was International Vice-President Woods who was the effective decision-maker regarding the question of Local 1788's jurisdiction under the Generation Projects and Transmission Agreements. Further, notwithstanding its protestations at the hearing, it is clear that Local 1788 knew and treated Woods as the decision-maker. All of its efforts to forestall any change to its jurisdiction were directed at or to Woods. Local 1788 made no effort to address the International President with respect to the matter.
- 69. Further, the jurisdictional change about which Local 1788 complains in this application was handled in the same way as the jurisdictional change which was made to Local 1788's jurisdiction in March 1989, which gave Local 1788 constitutional jurisdiction over contractors other than Ontario Hydro in the first place.

70. Woods did testify.

- International Vice-President Woods was slow to appreciate both the nature and the extent of the problem he was ultimately required to deal with. Indeed, we are not sure that he really understood the full extent of the problem or the implications of the conduct of the IBEW-EPSCCO, Local 1788 and the other IBEW Local Unions, or of his own conduct in 1989 and subsequently in 1992 to 1993 until the hearing of this application began. Because of that, he was slow to act (although in fairness we observe that he suffered from health problems which interfered with his ability to deal with the matter for a period of time in 1992), and he failed to appreciate what information he should be looking for, or that some of the information which he did obtain was either inaccurate or incomplete. For example, Woods did not fully appreciate that the long smouldering dispute between Local 1788 and the other IBEW Locals concerned the issue of which Local Unions have the jurisdiction to supply contractors of Ontario Hydro under the Transmission Agreement until 1992. And it was not until the hearing that Woods became aware that members of Local Unions other than Local 1788 who had performed work under the Transmission Agreement prior to 1993 (but after 1986) had done so after being cleared by Local 1788. As a result, he made statements in correspondence which he admitted were inaccurate, incorrect, or exaggerated (such as in his May 29, 1992 letter to John Sprackett of Local 1788), and his correspondence to the International President was incomplete in that he either did not describe or failed to include pertinent information concerning the history of the dispute and Local 1788's explanation of its position in that respect. Indeed, Woods' own notes indicate some vague awareness that he might require additional information which he neither had nor subsequently obtained.
- 72. Notwithstanding these failings, the Board is satisfied that International Vice-President Woods managed to obtain sufficient information and developed a sufficient understanding of the

issue to make an adequately informed assessment of the problem and what needed to be done to enable him to recommend, in his May 5, 1993 letter to the International President, the amendment to Local 1788's by-laws about which Local 1788 complains, and to adequately explain why that amendment was appropriate.

- 73. In that respect also, Local 1788 submits that it had neither notice of the possibility that its jurisdiction might be altered, nor opportunity to address the decision-maker in that respect, either in accordance with section 147(2) of the Act or otherwise.
- We observe that there was nothing like section 147(2) in Bill 80 when that legislation was given first reading on June 22, 1992. It was not until second reading, on October 12, 1993, after the amendment to Local 1788's by-laws which altered its jurisdiction had been made, that what is now section 147(2) first surfaced. Consequently, the International could not have known that Bill 80, which it was clearly aware was coming, would include such a provision. In any event, contrary to Local 1788's assertions, its Business Manager, John Sprackett, testified that "I was aware throughout that Woods wanted to change our jurisdiction." Further, Local 1788 availed itself of every opportunity to explain its position and make its representations with respect to the issue, both at various meetings with Woods and the IBEW-EPSCCO, and in correspondence like the March 15, 1993 submissions, for example. In our view, Local 1788 had sufficient notice of the proposed change to its jurisdiction, and had an adequate opportunity to explain its side of the issue.
- 75. In the result, although the process adopted by the International was flawed, the flaws are not, in the circumstances, fatal.

IX Section 147 - What does it Mean

- 76. We turn now to the merits of the International's decision.
- 77. Section 147 of the *Labour Relations Act* provides that:
 - 147. (1) A parent trade union shall not, without just cause, alter the jurisdiction of a local trade union as the jurisdiction existed on May 1, 1992, whether it was established under a constitution or otherwise.
 - (2) The parent trade union shall give the local trade union written notice of an alteration at least 15 days before it comes into effect.
 - (3) On an application relating to this section, the Board shall consider the following when deciding whether there is just cause for an alteration:
 - 1. The trade union constitution.
 - 2. The ability of the local trade union to carry out its duties under this Act.
 - 3. The wishes of the members of the local trade union.
 - Whether the alteration would facilitate viable and stable collective bargaining without causing serious labour relations problems.
 - (4) The Board is not bound by the trade union constitution when deciding whether there is just cause for an alteration.
 - (5) If a local trade union makes a complaint to the Board concerning the alteration of its jurisdiction by a parent trade union, the alteration shall be deemed not to have been effective until the Board disposes of the matter.

- 78. The Board heard much argument about what "just cause" means within the context of section 147, and what the test should be for determining whether an alteration of jurisdiction was for just cause. Again, in the interests of time, we do not intend to set out the arguments of counsel in that respect. Instead, we will address those arguments, implicitly or explicitly, in the course of our decision.
- 79. In the past, the Board has tried to avoid becoming involved in internal trade union affairs, or in adjudicating internal trade union disputes, except to the extent it has been necessary to do so in order to dispose of an application to the Board which required an inquiry into statutory rights or obligations. When the Board did find it necessary to do so, it was often in the context of duty of a fair representation (or referral) proceedings (now sections 74 and 75 of the Act), or when an issue was raised with respect to the manner in which a strike or ratification vote was taken (now section 79 of the Act). However, proceedings involving those issues are not purely internal to trade unions in that they involve an employment interest and statutory rights, and have ramifications for parties other than the trade union and its members. (See also paragraph 81, below.)
- 80. Section 147 creates rights and obligations which are purely internal to trade unions. The real issue in this case is whether the International had "just cause" to alter the jurisdiction of Local 1788 (as aforesaid). In our view, this is quite separate from a consideration of the International's conduct in altering the Transmission Agreement as it purported to do, something which would have been an issue had Local 1788 not withdrawn its allegations with respect to what is now section 73(2) of the Act. Although that is clear now, it was not so clear when this case began, although it was apparent that the Board was going to hear evidence in that latter respect as well, which is why we declined to reconsider our decision to grant the IBEW's entities other than the International, and the EPSCA and Ontario Hydro standing to participate in the application even after Local 1788 withdrew section 73(2) as a basis for it.
- 81. Prior to Bill 80 coming into force, the *Labour Relations Act* was not particularly concerned with the internal affairs or dealings of trade unions, except where otherwise internal dealings were specifically addressed in the Act, or otherwise impacted on statutory rights. (see sections 68, 79, and 89-94 of the Act, for example). Generally, however, neither the Act nor the Board were particularly concerned with a trade union's constitution, or its operation under that constitution. Such constitutional matters were considered to be matters of contract which were properly dealt with by the Courts in the event of a dispute. However, by promulgating Bill 80, the Legislature has determined that an internal trade union adjustment of jurisdiction is something likely to have an impact on the trade union(s) involved in its (or their) role as bargaining agent, and the employees and employers who are inevitably affected by such changes. The Bill 80 provisions give the Board a supervisory role which is similar to, but more intrusive than, the section 68 union successorship provisions, for example.
- 82. Consequently, we reject the suggestion that under section 147, the Board should continue to avoid reviewing internal trade union matters. It is apparent that all of Bill 80, including section 147, evidences a legislative intent that the Board exercise a supervisory jurisdiction over internal trade union affairs which the Board did not previously have. It is also apparent that section 147 *requires* the Board to review and adjudicate upon internal union matters when they concern an alteration of a local trade union's jurisdiction by its parent trade union.
- 83. Section 147 provides that a parent trade union *shall not* alter the jurisdiction of a local trade union without just cause. In an application relating to section 147, the Board is directed to consider the union's constitution (although it is not bound by that constitution either generally or as a matter of law, and specifically by the provisions of section 147 itself), the ability of the trade

union to carry out its duties under the Act, the wishes of the members of the local union, and whether the alteration of jurisdiction would facilitate viable and stable collective bargaining without causing serious labour relations problems.

- We also reject the suggestion that the Board's approach to section 147 should mimic the approach it takes to fair representation/referral cases, or that a parent trade union has some sort of "right to be wrong" when it alters a local union's jurisdiction. The fair representation/referral provisions prohibit a trade union from acting in a manner which is arbitrary, discriminatory or in bad faith in representation/referral matters. A trade union could act in a manner which is neither arbitrary, discriminatory nor in bad faith and still make a decision in such matters which someone else, like the Board, might consider to be "wrong". This explains the development of the "right to be wrong" part of the Board's fair representation/referral jurisprudence.
- 85. The Legislature could have used those same words in section 147. It could have said that when a parent trade union alters the jurisdiction of the local trade union, it shall not act in a manner which is arbitrary, discriminatory, or in bad faith. But the Legislature did not do so. Instead, the Legislature chose to prohibit a parent trade union from altering a local union's jurisdiction without "just cause", a term which is well known in labour relations.
- 86. In that respect, "just cause" is a term most often encountered in discipline or discharge grievance arbitration proceedings, and has come to mean "well grounded, fair, equitable and proper". It has been suggested that "just cause" requires a higher standard than merely acting reasonably and in good faith in that it requires an examination and evaluation of the basis for the decision under consideration, and the justice and reasonableness thereof.
- 87. The meaning which has been ascribed to the term "just cause" in grievance arbitration proceedings is not necessarily transferable to section 147, however. Care must be taken to examine the appropriateness and applicability of concepts or standards which have developed in one context before adopting them for use in another.
- 88. We are satisfied that "just cause" in section 147 of the Act creates an objective standard which requires something other than that a parent trade union act in a manner which is not arbitrary, discriminatory or in bad faith. While that may be part of the question which is properly asked in any given case, the question to be asked under section 147 is this: "Was the parent union's decision a fair and reasonable one having regard to all of the circumstances?"
- 89. The nature of section 147 and the factors which the Board is directed to consider under it requires that the Board not limit itself to an examination of the parent union's conduct in the decision-making process, and the factors which it considered. It may be that a parent union can do everything wrong in that respect and still end up with a decision which is fair and reasonable in the circumstances. That is, the question is not: "Could a parent trade union, acting honestly and looking at the situation and circumstances as a whole, and weighing the interests of all concerned, have reached the conclusion and made the jurisdictional decision it did?" Instead, the question is: "Having regard to the evidence before the Board, does that parent union's decision yield a result which is fair and reasonable."
- 90. In a proceeding under section 147 the Board is limited to considering the four factors listed in subsection 147(3). The wording of section 147 taken as a whole als suggests that the Board's power is limited to determining whether there was just cause for the alteration of jurisdiction under scrutiny. The wording of the provisions stands in sharp contrast to that of subsections 149(3) and (4) (also part of Bill 80) which also require the Board to decide whether a parent trade union had just cause to interfere with the autonomy of a local trade union, or for removing local

union officials from office, or changing their duties, but allows the Board to "consider such factors as it considers to be appropriate", and allows the Board to make whatever orders or directions it considers appropriate.

X Section 147 Applied

- 91. In this case, there is no issue regarding the International's right to alter an IBEW Local Union's jurisdiction, in this case the jurisdiction of Local 1788. It clearly has the right to do so. Indeed, Local 1788 does not suggest otherwise. What Local 1788 asserts, raises the question whether the alteration of Local 1788's jurisdiction in this case was justified under the constitution because "harmony and progress [did] not prevail", or because a dispute had arisen.
- 92. There is also no issue concerning Local 1788's ability to carry out its duties under the Act. It is clear that Local 1788 has been vigilant, forceful and vigorous, both generally and specifically in matters having to do with its jurisdiction. No one disputed Local 1788's ability to carry out its duties under the Act at all material times. There was no suggestion that Local 1788's "ability" in that respect had anything to do with the alteration of its jurisdiction.
- Nor is there any question regarding the wishes of Local 1788's members. Local 1788 has enjoyed very strong support for the position it took in the dispute which is the subject of this application from its members at all material times. In that respect, we did not understand any part of Local 1788's position to be that a jurisdictional change which is opposed by the members of the local union in question is somehow presumptively without just cause. We do not find that to be a tenable position in any event. The "wishes of the members of the local union" is just one of the four factors the Board is required to consider under section 147. Further, in the construction industry, it will be the rare case indeed in which members of a local union will want to give up jurisdiction (which in the construction industry translates into work or opportunities for work). If the Legislature had intended that members' wishes have some sort of veto effect, it could have said so. The Legislature has not said so.
- 94. There are therefor two issues for the Board to consider in this case. The first is the application of the IBEW Constitution to the alteration of Local 1788's jurisdiction, and more specifically, whether the International acted in accordance with the Constitution in that respect. Again, this is but one of the factors which must be considered by the Board, and whether the International did or did not act properly under the Constitution is not determinative of this application. Indeed, subsection 147(4) specifically provides that the Board is not bound by the trade union constitution in deciding whether there was just cause for the alteration of jurisdiction.
- 95. The second question relates to the broadest and most general factor which the Board is required to consider; namely, "whether the alteration would facilitate viable and stable collective bargaining without causing serious labour relations problems." This requires the Board to consider whether a legitimate collective bargaining purpose would be served by the alteration of jurisdiction which will not create significant labour relations problems; both as between the trade union entities involved, and as between those trade unions and their employer collective bargaining partners. It is important to consider the former not only because section 147 deals with what is fundamentally an internal trade union matter, but also because such questions also involve important issues of statutory rights, and generally have an impact on collective bargaining relations with employers (which is why the latter must also be considered).
- 96. Local 1788 was created for the purpose of representing direct employees of Ontario Hydro, and for no other purpose. Until 1972, Local 1788 held no bargaining rights of its own, but merely administered bargaining rights held by the International for employees of Ontario Hydro.

- in 1971, the International transferred bargaining rights limited to employees of Ontario Hydro to Local 1788. This transfer was confirmed by this Board in 1972. Local 1788 exercised and administered these bargaining rights, with respect to Ontario Hydro employees only, until 1980.
- 97. Prior to 1980, Ontario Hydro did virtually all of its transmission and miscellaneous hydraulic projects work using its own employees. On the evidence before the Board in this case, those Hydro employees were represented by Local 1788. On those few occasions when such work was contracted out, it was performed by members of the IBEW Local Union with geographic jurisdiction in the area in which the work was located, or the work was performed non-union. As Hydro began to contract out work, a debate began within the IBEW with respect to how to deal with this development. The result of this was that Local 1788 continued to represent only employees of Ontario Hydro and the other IBEW Local Unions represented employees of contractors of Ontario Hydro according to their geographic jurisdiction. The first Generation Projects and Transmission Agreements were negotiated with the EPSCA and came into effect in 1980. Although the words of the 1980 Transmission Agreement are somewhat ambiguous, we are satisfied that these agreements were intended to reflect this Local 1788 and Ontario Hydro vs. the other IBEW Local Unions and Hydro contractors division of jurisdiction. Between 1980 and 1986, all or virtually all transmission systems work continued to be done by Hydro using its own employees. To the extent that there was such work which was contracted out it was also performed by members of Local 1788. In the circumstances, however, including the boom in electrical power systems sector construction work during that period, we are not satisfied that the amount of contractors work performed by Local 1788 is particularly significant. During that time, Local 1788 tried unsuccessfully to have its jurisdiction amended to include work performed by contractors for Ontario Hydro (which attempt was rebuffed by the Canadian Vice-President Rose).
- 98. In 1986, however, Local 1788 and the EPSCA negotiated a change to the Transmission Agreement which gave Local 1788 jurisdiction over such contractors. It appears, that the International, which vets and approves all collective agreements, was asleep at the switch and did not notice this. Nevertheless, the internal debate over jurisdiction continued, with the IBEW Local Unions other than Local 1788 insisting that, they, not Local 1788, had jurisdiction over Ontario Hydro's contractors. By 1987, Woods was Canadian International Vice-President. It is apparent from his evidence that he did not understand the true nature of the jurisdictional issue and as a result erred in the position he expressed in that respect, to Local 105 for example. Local 1788 seized upon this opportunity to request a change to its jurisdiction to accord with its "practice". In our view, the change it requested, namely to give it jurisdiction over employees of contractors as well as employees of Ontario Hydro, could not be justified on the basis of "practice", because prior to 1986 it had no significant practice in that respect. However, it was consistent with the Transmission Agreement Local 1788 had managed to negotiate with the EPSCA.
- 99. After discussing Local 1788's request with the IBEW-EPSCCO and the other IBEW Locals, Woods took the request at face value and recommended the jurisdiction change requested, which recommendation was in effect rubber stamped by International President Barry. Although Woods is not blameless, this time it was the IBEW-EPSCCO and the other Local Unions which were asleep at the switch.
- 100. The other Local Unions awoke from their slumber when the boom in construction work in the electrical power systems sector ended and work shortages developed. They complained to Woods and demanded that the International intervene and resolve the dispute. Woods also received some telephone calls from contractors and the ECAO (although not the "deluge" of telephone calls he described in his letter to Barry). In any event, the true nature of the problem began to dawn on Woods; that is, that there was a dispute between Local 1788 and the other IBEW Local

Unions concerning jurisdiction over Ontario Hydro's contractors, and that he had inadvertently given Local 1788 a leg up in that respect by agreeing to amend its jurisdiction as it had requested in 1989. Woods then engaged in the rather tortuous process which eventually led to the alteration of Local 1788's jurisdiction - back to what it was prior to the unwarranted change in 1989.

- The Board is satisfied that there was an internal jurisdictional dispute which had to be addressed by the International. In the words of the constitution, "harmony and progress [did] not prevail", because of "a dispute" between the Local Unions which was affecting the employers with which the various Local Unions had collective bargaining relationships. Further, we are satisfied, on a balance of probabilities having regard to the evidence before the Board, that something had to be done to resolve the dispute, and that the International's decision, made by International Vice-President Woods and approved by International President Barry, was a fair and reasonable resolution of the dispute and solution to the problem. It was a solution which returned the IBEW construction Local Unions to their jurisdictional positions as they were intended to be, and as they were prior to 1986; that is, with Local 1788 representing employees of Ontario Hydro and the other IBEW Locals representing employees of all other employers in the electrical power systems sector, whether as Ontario Hydro contractors or otherwise, according the their geographic jurisdictions. The anomaly in this case is the period between 1986 and 1993. That anomaly was created by Local 1788's relative size and presence in the electrical power systems' sector, which it used in its aggressive approach in negotiations and in the field, to jurisdiction (something which we do not criticize) combined with the International's error in altering Local 1788's jurisdiction in 1989, and with the inability of the International, the IBEW-EPSCCO and the other IBEW Local Unions to recognize or deal with the situation created by Local 1788 and the International's error.
- 102. Further, we are satisfied that changing Local 1788's jurisdiction back to what it was intended to be, and which for most of its history it was, will more probably than not facilitate viable and stable collective bargaining without causing serious labour relations problems. There is nothing in the evidence which suggests that there were any collective bargaining problems prior to 1986 which resulted from restricting Local 1788's jurisdiction to employees of Ontario Hydro, or that collective bargaining was other than viable and stable. On the other hand, it is clear that there was much discord and a distinct lack of harmony within the IBEW, and that there were some concerns among employers other than Ontario Hydro after 1986, which created some collective bargaining difficulties and ultimately led to this application and other proceedings before the Board, all of which have been rather rancorous. We are satisfied that a correction of the error which the International made in 1989 and a return to the pre-1989 *de jure* and pre-1986 *de facto* jurisdiction will facilitate a return to viable and stable collective bargaining. We are further satisfied that this will not create any serious labour relations problems.
- 103. In arriving at these conclusions, we have considered Local 1788's assertions that it would "better" to allow it to retain its expanded jurisdiction because of what it means to itself, the IBEW as a whole, and to employers in the electrical power systems sector. There is nothing in the evidence or Local 1788's submissions which we find compelling in that respect. It is true that this could result in IBEW members performing the same work on the same project working under different terms and conditions of employment depending on who their employer is. But that distinction will be drawn on the basis of whether the persons concerned are employed by Ontario Hydro or some other contractor, and no one can deny that Ontario Hydro has always been treated differently from other contractors. Nor are we satisfied that allowing Local 1788 to retain its expanded jurisdiction would create a more efficient or "better" situation in the perspective of any IBEW entity other than Local 1788 itself, or from the perspective of the IBEW as a whole. In that respect, we find Local 1788's argument that the International and the other locals have "ganged up" on it to be misplaced and rather disingenuous. On the evidence, it is apparent that it is Local

1788 which has been the dominant IBEW player in the electrical power systems sector over the years and that it has used its "muscle" to further a strategy of expanding its jurisdiction at the expense of its sister Locals. Finally, resolving this issue in the manner in which the International did was a sensible and rational way of finally putting an end to the internal IBEW discord and putting the jurisdictional issue to rest. From a labour relations perspective, that can only be a good thing.

XI Conclusion

104. In the result, the Board is satisfied that the International had just cause to alter the jurisdiction of the application Local 1788 in the manner it did. This application is therefor dismissed.

XII One More Thing

Having regard to the submissions of counsel for the EPSCA and Ontario Hydro we find ourselves constrained to make one further comment. Neither the fact that this application has been dismissed, nor anything in the decision should be read or taken to mean that the International or the IBEW-EPSCCO was entitled or able to alter or amend either the parties to or the terms of the Transmission Agreement as they purported to do, either unilaterally or with the agreement of the EPSCA. No non-party, whether an international union, a council of trade union or anyone else, is entitled to thrust itself into a collective bargaining relationship to which it is not a party. Bargaining rights can only be dealt with under the applicable provisions of the *Labour Relations Act*. Provisions of a collective agreement can only be altered by agreement of the parties (or the Board in appropriate circumstances). In this case, the parties to the Transmission Agreement were and are the EPSCA and Local 1788. Neither the International nor the IBEW-EPSCCO were entitled to make any change to the Transmission Agreement. The fact that an internal union jurisdictional change has been made does not necessarily alter collective bargaining relationships or collective agreements. Under the *Labour Relations Act*, then and now, those are separate, although not necessarily unrelated, matters.

4637-94-R; 3471-95-G International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades, Applicant v. Magnum Glass Inc., Magnum Associates Ltd., Magnum Glass Installations Ltd., Hardie Glass & Aluminum Inc., Responding Parties; International Brotherhood of Painters and Allied Trades, Local 1819, Applicant v. Magnum Glass Inc., Magnum Associates Ltd., Magnum Glass Installations Ltd. and Hardie Glass & Aluminum Inc., Responding Parties

Bargaining Rights - Certification - Construction Industry - Practice and Procedure - Sale of a Business - Related Employer - Responding employer asking Board to bar union's sale of a business and related employer applications filed while certification application pending in connection with same employer - Employer's request dismissed

BEFORE: Jules B. Bloch, Vice-Chair.

APPEARANCES: Elizabeth M. Mitchell, Dermot Lynch, Gayle Okrainec and Edward Okrainec Jr. for the applicant; Walter Thornton and Stuart Hardie for the responding parties.

DECISION OF THE BOARD; February 1, 1996

- 1. The style of cause in respect of Board File No. 4637-94-R is amended by adding Hardie Glass & Aluminum Inc. as a responding party.
- 2. Board File No. 4637-94-R is a application brought by the International Brotherhood of Painters and Allied Trades (the "Painters" or the "union") in respect of sections 69 and 1(4) of the Labour Relations Act, 1995 (the "Act"). Board File No. 3471-95-G is a grievance, brought by Painters, Local 1819, pursuant to section 133 of the Act in the construction industry concerning the interpretation, application, administration or alleged violation of the Provincial ICI collective agreement.
- 3. At the start of the hearing the responding parties in attendance, Hardie Glass and Aluminum Inc. ("Hardie") and Magnum Associates Limited ("Magnum Associates") made a preliminary motion in respect of the 69/1(4) application.
- 4. Hardie and Magnum Associates submit that the Board should bar this application because the Painters on February 23, 1995 filed an application for certification (File No. 4206-94-R) in relation to Magnum Associates. That application for certification makes no reference to a claim for existing bargaining rights or a claim that there exists a collective agreement between the applicant and Associates. Associates and Hardie assert that the applicant has made an admission against interest by filing the certification application, an admission that the applicant did not and does not hold bargaining rights in respect of their companies. Consequently, they assert, there should be a bar to the bringing of the instant application, pursuant to section 1(4) or 69, which application is inconsistent with and would undermine the certification application admission that the applicant held no bargaining rights at the time they brought the application for certification.
- 5. By way of background information, on January 1, 1986 Mr. Edward Okrainec on behalf of Magnum Glass Installations Limited ("Installations") executed a voluntary recognition agreement with the applicant binding it to the Glaziers Provincial Agreement in the ICI sector and Board Area 8. Subsequent to that, the company complied with the agreement and made monthly contributions to the applicant's various trust funds, in the name of Magnum Glass. In October 1994, as a consequence of the death of Edward Okrainec, Sr., Magnum Glass ceased operations. In February, 1995, the Painters learned that its bargaining unit work was allegedly being performed by non-union employees at the Doctor's Hospital. The general contractor was Harbridge and Cross and the applicant found out that the contract was let to Magnum Associates. The Painters' business representative met with Mr. Stewart Hardie, and an arrangement was made whereby two union employees from the hall were sent to the job site and Mr. Hardie agreed to hire those employees. On February 23, 1995 the applicant filed a certification application in Board File No. 4206-94-R in respect of the Harbridge and Cross job site. The applicant and Magnum Associates.
- 6. On March 20, 1995 after the Painters had received the responding parties' response in the certification application, and after the Board appointed a Labour Relations Officer, the Painters filed the instant application, pursuant to sections 69 and 1(4) of the Act.
- 7. The respondent submits that an application for certification in respect of Magnum Associates is a representation by the applicant that it does not have bargaining rights for Magnum Associates. In the responding parties' view, this amounts to an admission against interest in the context

of the applicant's 69 and 1(4) application. The responding parties rely on *Brown Boveri Howden Inc.*, [1987] OLRB Rep. Mar. 316; *Johnson Controls Ltd.*, unreported decision dated March 8, 1988; *L'Abbe Construction (Ontario) Ltd.*, [1987] OLRB Rep. Oct. 1191; *J. A. Wilson Display Ltd.*, [1983] OLRB Rep. July 1080, and *Associated Paving Company Ltd.*, unreported decision dated June 19, 1995. Further, the responding parties submit that a formal admission may be made by a statement in the pleadings in the application for certification in Board File 4206-94-R. In the responding parties' view, the admission cannot be withdrawn by the applicant except with the leave of the Board or the consent of the responding parties. The responding parties do not consent to the applicant withdrawing the admission referred to above.

- 8. The Painters assert that the Act allows them to make arguments in the alternative in respect of a certification application and an application pursuant to sections 69 and 1(4). In the Painters' view, sections 69 and 1(4) involve a forensic study of fact in respect of whether existing bargaining rights in respect of Magnum Glass apply to either Hardie or Magnum Associates, as related employers or as successor employers within the meaning of the Act. In any event, the Painters assert that they are entitled to bring both applications in the alternative. Although that may seem inconsistent on its face, it is not so when one considers the Painters' goal of either maintaining bargaining rights with the responding parties or commencing bargaining rights with the most recent alleged spin-off company. In any event, the goal for the Painters is to have bargaining rights in place with the group of responding parties.
- 9. The Painters further assert that an admission against interest is a rule of evidence. It was developed as an exception to the hearsay rule. In the applicant's view, it is unreasonable that an evidentiary rule can create a bar to a union's application in respect of another proceeding within the Act. In short, assert the Painters, the Board is being asked to apply a hearsay exception rule created for a specific evidentiary purpose as a bar in respect of the exercising of a statutory right under the Act.
- 10. Further, the Painters assert that although in the narrow context, an application for certification followed by an application pursuant to section 69 or 1(4) of the Act might be seen as inconsistent, in the wider context it should be seen as perfectly reasonable. In the Painters' view, a section 69 and 1(4) application takes a very long time to litigate and the ultimate purpose is to preserve bargaining rights from the original company to the successor or related companies. An application for certification on the other hand, should everything go according to the union's plan, takes a relatively short time and bargaining rights would in this view issue in very short order. The union asserts that it decided to take the course of action it did because of the time factor involved and because its view was that it could rely on the section 69/1(4) application in the alternative.
- 11. In any event, asserts the trade union, any conduct which the union has engaged in can be dealt with in respect of the section 1(4) application in that the alleged conduct would go to the discretion of the Board at that time. (See *Andreynolds Company Limited*, [1990] OLRB Rep. Nov. 1107.)

Decision

12. It is my view that no bar should apply in respect of the section 69/1(4) application. The trade union has made applications, at different times, for both certification and relief under sections 69/1(4). These two avenues or applications are not mutually exclusive. The section 1(4)/69 process is in effect a forensic review of facts which may or may not lead to a remedy that preserves existing bargaining rights. The certification application engages a process to acquire bargaining rights. The two types of applications rest upon different functions and claim different remedial relief, but it is not at all apparent why applicants cannot seek to make either, or both.

- 13. While it may well be that the applicant could not have been successful in both (unless the 1(4) application seeks to preserve bargaining rights acquired for the first time through the certification itself), a union is not required to abandon one alternative approach in order to bring the other. The Act itself contemplates alternative procedures in respect of allowing a trade union to proceed by certification application or by section 69/1(4) applications or both. Had the legislature wanted to curtail an applicant's right to apply in the alternative they would have done so clearly in the statute. Counsel for the responding parties conceded that, had the union in its application for certification simply reserved its right to bring a section 69/1(4) application, in the alternative, there would be no issue that the trade union was entitled to commence both types of applications. We see little merit in holding that the applicant is precluded from asserting a right or claiming a remedy only because it did not use words in filing the applications that indicated that they were based upon alternative positions.
- 14. The cases of Brown Boveri Howden Inc., supra; L'Abbe Construction Inc.; supra, Johnson Controls Ltd., unreported; J. A. Wilson Display Ltd., supra; and Associated Paving Company Ltd., supra, are cases which deal with the proposition that a collective agreement is a bar to certification. In other words, if there is an application for certification and any party can raise a valid collective agreement relating to the bargaining unit applied for, then there are no bargaining rights open for an applicant to apply for. The applicant would have to wait for the open period to make an application for certification.
- 15. For all the reasons above we would dismiss the preliminary motion.
- 16. I remind the parties that I made certain oral rulings in respect of pleading requirements and those rulings should be attended to prior to the next hearing dates.
- 17. The hearing on the merits will begin on March 6 and March 7, 1996 at the Boardroom, 6th Floor, 400 University Avenue, Toronto, Ontario, commencing at 9:30 a.m.

3163-95-R Pauline Stoddart, Applicant v. **Ontario Public Service Employees Union**, Responding Party

Practice and Procedure - Termination - Timeliness - Board presented with third termination application regarding same bargaining unit since August 1995 - First application withdrawn and second application dismissed after hearing and Board's conclusion that petition not proven to be voluntary - Board relieving against strict application of Interim Certification and Termination Rules and finding third application sent by registered mail before, but received after, appointment of conciliation officer to be timely - Board, however, exercising its discretion under section 111(2)(k) of the Act to refuse to entertain third application

BEFORE: K. G. O'Neil, Vice-Chair, and Board Members O. R. McGuire and C. McDonald.

APPEARANCES: Pauline Stoddart, Pamela Wayne and Brent Price for the applicant; Richard A. Blair, Barbara Linds, Ed Ogibowski and Carole Whitehead for the responding party.

DECISION OF THE BOARD; February 19, 1996

1. This is an application for termination of bargaining rights. The Board (differently constituted) in a decision dated January 12, 1996 ordered the matter set down for hearing on two issues: the timeliness of the application and whether or not the application should be entertained in view of the fact that it is the third application for termination in respect of the same bargaining unit in a short period of time.

Timeliness

2. The application was sent to the Board by registered mail on November 17, 1995 and received by the Board on November 24, 1995. A conciliation officer was appointed on November 17, 1995. These facts must be seen in the context of section 67(2) of the *Labour Relations Act*, 1995 which provides as follows:

67.-(2) Where notice has been given under section 59 and the Minister has appointed a conciliation officer or a mediator, no application for certification of a bargaining agent of any of the employees in the bargaining units as defined in the collective agreement and no application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit as defined in the agreement shall be made after the date when the agreement ceased to operated or the date when the Minister appointed a conciliation officer or a mediator, whichever is later, unless following the appointment of a conciliation officer or a mediator, if no collective agreement has been made,

- (a) at least 12 months have elapsed from the date of the appointment of the conciliation officer or a mediator;
- (b) a conciliation board or a mediator has been appointed and 30 days have elapsed after the report of the conciliation board or the mediator has been released by the Minister to the parties; or
- (c) 30 days have elapsed after the Minister has informed the parties that he or she does not consider it desirable to appoint a conciliation board,

whichever is later.

[emphasis added]

Pursuant to section 67(2) of the Act, the Board is not able to entertain applications for termination once a conciliation officer has been appointed until the conditions set out in paragraphs (a) to (c) have transpired. It is not suggested that any of those events have taken place on the facts before us. The union takes the position that the Board's Interim Rules of Procedure apply to this situation so that the application should be counted as made on the date it was received. November 24. Since this is after November 17, the date the conciliation officer was appointed, the union says the application is untimely.

3. The union's position is based on the application of the Board's Interim Rules of Procedure which provide as follows:

INTERIM CERTIFICATION AND TERMINATION RULES

Commencement

43h. These Rules come into effect on the day on which the Labour Relations and Employment Statute Law Amendment Act, 1995 receives Royal Assent.

Application

43i. These Rules amend the Board's Rules of Procedure, which continue to apply, except to the extent that they conflict with these interim Rules. These Rules apply only to applications for

certification and to applications for termination of bargaining rights filed on or after the day on which these Rules come into effect and Rules 43 to 56 do not apply to those applications.

Conflict

43j. Where there is any conflict between these interim Rules and any other rules, these interim Rules apply.

Filing and Delivery

43k. Rules 8 and 9 do not apply to applications for certification or applications for termination of bargaining rights filed on or after the day on which these Rules come into effect.

. . .

430. The date of filing is the date that a document is received by the Board. However, in the construction industry, if an application is sent by Priority Courier, the date of filing is the date on which the application is sent (as verified by the Post Office).

The Board's "old" Rules of Procedure in effect under Bill 40 and still in effect except where they conflict with the new rules, provide as follows:

- 8. The date of filing is the date a document is received by the Board or, if it is mailed by registered mail addressed to the Board at its office at Toronto, the date on which it is mailed, as verified in writing by the Post Office. However, the date of filing in cases brought under sections 11.1, 41, 73.1, 73.2, 92.1, 92.2, 93, 94, 95, 126 and 137 of the Act is the date the document is received by the Board.
- 4. Bill 7 received Royal Assent on November 10, 1995. On November 16, 1995 the Board put into place interim Rules of Procedure, of which the above-quoted sections 43h, i, j, k and o form a part. These were mailed out to known members of the labour relations community at that time, but the current applicants did not have them until November 27, 1995 when the Registrar mailed them to them after the application was received. What the applicants did have was the Board's Rules of procedure which had been in place under Bill 40, which provided, in section 8 set out above, that registered mail would secure a filing date of the date shown on the registration with the post office. In reliance on those Rules, the applicants mailed the matter by registered mail on November 17. They ask for relief against the strict application of the new Rules as they did not have them, were not aware of them and therefore feel that it would be unfair to have them applied to them.
- 5. The Board has the power to relieve against the application of the Rules by virtue of Rule 22 which provides as follows:
 - 22. The Board may relieve against the strict application of these Rules where it considers it advisable.
- 6. The union says that it is important in this time of transition between regimes of legislation that there be certainty for the labour relations community and thus the interim Rules promulgated on November 16 should be applied, as they are clear on their face. Counsel argues that it is impossible for the Board to comply with the requirements of the legislation if it is subject to the vagaries of the mail, even registered mail. Counsel cites the facts of this case, as an example. If the application date is deemed to be November 17 because of the use of registered mail but the application was not received until November 24, the Board was incapable of complying with the statute's provision for a vote within five days of the application date, being that it did not have any notice of the application until several days after the five days had expired. Union counsel observes that it is consistent with what is required by the new legislation that the Board require actual

receipt of the application with the necessary information before the five days start running. Counsel says in the absence of obvious special circumstances the Rules should be applied because they are sensible and provide certainty to the parties.

- Counsel further argues that since the Interim Rules also apply to certification applica-7. tions, decisions about when to bend the Rules in termination applications affect certifications as well. Counsel submits that it is a substantive right of the union to know with some certainty what the Rules are under the new regime. Counsel says it is not appropriate to give the applicants the benefit of the new provisions where they can have a successful termination application without proving voluntariness without the burdens of the Rules that come with it. The union relies on Ventar Ltd., [1978] OLRB Rep. Oct. 958, where the Board refused to go behind the date of the appointment of a conciliation officer holding that the parties were best served by certainty, and argues that the same principle of certainty should prevail here. Reference was also made to Hemlo Gold Mines Inc., [1993] OLRB Rep. Mar. 158, where the Board found that it did not have discretion to assign other than the filing date as the date of application. As well, counsel referred to Shaw Industries Ltd., [1993] OLRB Rep. Aug. 798 and Lutheran Nursing Home (Owen Sound), [1994] OLRB Rep. Oct. 1362, where the Board applied the Rules to accept an application for certification that had been sent by registered mail without considering a petition sent by courier which actually had arrived first. In coming to that conclusion, the Board commented on the fact that Bill 40 had made application dates critical in the consideration of certification applications and that a clear "bright line" test was needed with respect to determining the timeliness of documentary material.
- 8. After the hearing, union counsel wrote asking us to consider the decision of the Board, differently constituted, dated January 31, 1996, in *Tracy MacLellan and others* v. *OPSEU* (Board File No. 3381-95-R) [now reported at [1996] OLRB Rep. Jan. 23], as he had made reference to the interim decision at the hearing. We have reviewed it, but given our view of the issue before us, it is not determinative. In that case, whether one applied the Rules available November 16, 1995, or the ones which had been available since 1993, the result would have been the same. Here the strict application of the Interim Rules would make a difference in the result on the timelines issue.
- 9. Although strictly speaking it may be unnecessary to decide the timeliness issue, given our disposition of the case, we are of the view that the matter should be considered timely. The Board agrees with the remarks in the above cases about the importance of certainty in the application of the Rules and that uneven application can cause unfairness. However, the fact is that in all of the above-noted cases, the Rules were available and the parties could have known their options and responsibilities under the Rules. In the particular and narrow circumstance before us, where the applicants were in the process of preparing their application on the very day that the Rules were made available in Toronto for the first time, we are not of the view that it is appropriate to apply the Interim Rules strictly to them. In the exercise of our discretion, we are of the view that in these limited circumstances, we should relieve against the application of the Interim Rules as there was no prejudice (other than the possible entertainment of the application) asserted by the respondents. Both of them had received copies of the application by fax on November 17, 1995. If one relieves against the application of the Interim Rules, Rule 8 is still otherwise in effect and registered mail is the date to be used for the determination of the date of filing in this matter.
- 10. Counsel for the union did not suggest that the matter was untimely if filed on the same day as a conciliation officer was appointed. Therefore, we find the application to be timely and the application date to be November 17, 1995.

The Question of Multiple Applications

- 11. The union asks that we decline to entertain this application and pose a bar under section 111(2)(k) which provides as follows:
 - 111.-(2) Without limiting the generality of subsection (1), the Board has power,

. . .

- (k) to bar an unsuccessful applicant for any period not exceeding one year from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing the employees within any period not exceeding one year from the date of the dismissal of the unsuccessful application;
- This is the third termination application regarding this bargaining unit since August, 1995. The first application was filed on August 21, 1995, shortly after the union had applied for combination of bargaining rights. It was withdrawn on September 19, 1995 after the union filed its response (Board File No. 1997-95-R). The second application was filed on September 27, 1995, twelve days after the withdrawal. There was a full hearing and the application was dismissed in a decision of the Board (differently constituted) dated November 9, 1995 because it was found that voluntariness of the petition had not been proven (Board File No. 2507-95-R). The Board's reasons are crystallized in the following passage from ¶26 of that decision:
 - 26. . . . However, the evidence of both Ms. Taylor and Ms. Caley was clear that in his effort to persuade them to sign the [first] petition, Mr. Marchand approached them with a memorandum signed by the Town's Chief Administrative Officer stating that the terms and conditions of employment would be preserved in the event of decertification and that the employer would thereafter recognize the employees in an "association". Furthermore, the evidence supports the inference that the contents of the memo would be widely known to the employees, at least prior to their signing of the second petition if not the first. Under such circumstances, it would be reasonable for employees to conclude not only that the employer was generally supportive of Mr. Marchand's and Ms. Wayne's efforts to rid themselves of the union, but also that the employer was materially allied in these efforts by providing to the petitioners what are in effect assurances of unchanged working conditions and alternate representation in bargaining upon decertification. On balance, we are satisfied that the representations made by Mr. Marchand would create a strong impression amongst employees that the employer was materially supportive of the decertification efforts, and they could have little confidence that the fact of their signature would not become known to the employer. Finally, we conclude that subsequent events did little to assuage such concerns.
- This third application was filed on November 17, eight days after the issuance of the decision of the Board dismissing the second application. In the meantime, the union had applied for conciliation. Subsection 111(2) gives the Board the power to prevent multiple applications from being litigated before the Board. It can bar an unsuccessful applicant from bringing further applications for up to a year, or refuse to entertain the application of an unsuccessful applicant or any employees affected by the unsuccessful application. On the facts before us, Ms. Stoddart is one of the employees affected by the application dismissed on November 9, 1995. As well, she originally filed this application listing the same applicant as in the dismissed application, i.e. "Office and Technical Employees of the Town of Midland". The union filed an interim response objecting to an application in the name of a group. Then, when the application was returned for filing on the new forms under Bill 7, Ms. Stoddart applied in her own name. From Ms. Stoddart's remarks at the hearing, and the correspondence to the Board, it is very clear that this is a group application. All of the signatures on the documents supporting this application were also on the petition sup-

porting the dismissed application, although there was one signature on the earlier application which does not appear on the one before us.

- 14. Union counsel refers to the applicant's correspondence of November 26, 1995 in which Ms. Stoddart refers to this application as their third submission and says that this is further evidence of just how voluntary the application is. Thus, the applicant does not seek in any way to disassociate herself from the previous applications. Union counsel argues that this is, in effect, an application for reconsideration in that the applicant makes clear in her covering letter and her submissions of November 26 that she is pursuing the same goal as the earlier applications.
- 15. The main reason underlying the union's request that this application not be considered is its view that meaningful collective bargaining is unduly hampered as long as a cloud of litigation hovers, as it has since August 1995. Counsel argues that the Board's jurisprudence is clear that the right of the employer and the union to bargain without this cloud is to be balanced against the rights of employees to bring applications for termination. Counsel referred to Venture Industries, [1993] OLRB Rep. July 707, Browning Ferris Industries Ltd., [1982] OLRB Rep. Sept. 1253 and Ontario Hospital Association (Blue Cross), [1981] OLRB Rep. Apr. 468, as authority for the proposition that the Board has not and will not entertain applications in circumstances like these. Counsel acknowledges that every case is different and the particular combination of circumstances, such as whether there has been a vote or not, is different in each case. Counsel acknowledges that there has been no vote and therefore no full testing of employee wishes in this case. However, counsel says the facts here are sufficient as there has been a withdrawal and then an application that is fully canvassed on its merits and found not proven to be voluntary. Within a week, this application is filed by someone intimately involved with the just dismissed application, as Ms. Stoddart appeared with the applicant at the hearing of the matter. Further, it is couched in terms of trying to get the same result that was just denied them, i.e. in terms of reconsideration. It would be impossible to litigate this application without relitigating the same issue dealt with in the second application. Counsel argues this should be a major consideration for the Board as it was in Ontario Hospital Association (Blue Cross), cited above. Counsel argues that the rights of the collective bargaining agent need some protection in order for the employer and the union to be able to bring the required attention to the table to fulfill their obligation to bargain and conclude a collective agreement. The parties to that relationship need some stability to get on with the bargaining. Counsel submits that it is clear from the applicant's correspondence to the Board that they will come back as often as they are permitted and the union will never get the right to bargain with any period of stability.
- 16. On behalf of the applicants, Ms. Stoddart said that the circumstances were different for each of the three applications. Furthermore, she said that the fact that this is the third application shows that they are voluntary and that the percentage of people who want to decertify has not changed. She acknowledged that she had used the term "we" and said that it was a team effort, that it is a group of people who have signed and that she is speaking on their behalf. On the point of the purpose of the third application, she said it was to prove that it was voluntary and not to be malicious.
- 17. Although the employer did not appear, its counsel wrote in to deny the allegations made against it in the union's response and to suggest that the allegations of employer interference should not be relitigated in light of the dismissal of the union's unfair labour practice complaint. The letter indicates that the employer accepts the findings of fact determined in Board File Nos. 2357-95-U and 2507-95-R. It should be noted that in the decision of the Board referred to by employer counsel, the Board decided not to inquire further into the unfair labour practice allega-

tions, which had been scheduled to be heard with the second termination application, in light of its ruling on the termination application and the fact that the relief requested was only a declaration.

18. What is required here is a balancing of the interests of all parties concerned in light of the purpose of section 111(2)(k). The Board dealt with a similar set of facts in *Browning-Ferris Industries Ltd.*, [1982] OLRB Rep. Sept. 1253. There a termination application was dismissed because the applicant failed to establish that it had the support of 45% of the employees in the bargaining unit. No representation vote was held, as here. A second application was filed on its heels, as here. At paragraph 6 the Board had this to say:

6. The Board turns now to whether it should refuse to entertain the application as requested by Local 419. When the Board has decided that question in the past, it has concerned itself with the need to balance the right of employees to select or dispose of a bargaining agent with the need to allow the employer and trade union who are parties to a collective bargaining relationship a period of stability and continuity in that relationship. In this respect, for a very helpful review of the Board's decisions wherein it has sought to balance these competing but equally significant considerations, see the Board's decision in *Seven-Up (Ontario) Limited*, [1971] OLRB Rep. Dec. 792. At paragraph 16 of the decision the Board sums up this principle or policy in the following words:

The *Trinidad Leaseholds Case* and subsequent decisions based on its principles stand for the proposition that when a second application for certification or termination is made upon the heels of a prior application involving the same parties, in determining whether it should refuse to entertain the second application, the Board must balance the right to test an incumbent trade union's strength among the employees it represents at an appropriate time against the maintaining of continuity and stability in an existing collective bargaining relationship. Stated another way, once a representation issue has been dealt with on its merits and in the absence of special circumstances, then an incumbent trade union ought to be afforded a reasonable opportunity to demonstrate, without undue impediment, its ability to bargain with that employer for a collective agreement on behalf of those employees it represents.

- There can be no exhaustive list of the special circumstances which would warrant hearing the second or subsequent application rather than favouring the concept of stability in the parties' bargaining. A fair selection of such reasons was canvassed in *Ontario Hospital Association* (Blue Cross), cited above. The Board there referred to the types of dismissals in initial cases which allowed for entertaining subsequent ones as ones involving a technical irregularity, quickly dispatched with minimal disruption of bargaining. The Board there made it clear that a prior representation vote is not necessary for the Board to have good reason to refuse to entertain a second application in the following passage from ¶22:
 - 22.... However, the cases also make it clear that where there is an ongoing bargaining relationship an application need not result in an actual representation vote to cause the Board to refuse to entertain a second application under section 92(2)(i) [now section 111(2)(k)]. For example, an application for certification dismissed because the applicant could not establish itself as a trade union within the meaning of the Act has provided a basis to the invocation of section 92(2)(i). See Filey-Hall Paper Box Co. Ltd., supra. A similar result has followed where a certification application was dismissed at a hearing because of clearly insufficient membership evidence support. See Trinidad Leaseholds (Canada) Ltd., supra. The same end can befall a second termination application where the first is dismissed because the Board is not satisfied that at least 45% of the employees in the bargaining unit have voluntarily signified in writing that they no longer wish to be represented by the incumbent trade union. See Seven-Up (Ontario) Limited, [1971] OLRB Rep. Dec. 791; Continental Can Company of Canada Limited, [1964] OLRB Rep. Dec. 459 (the second application dismissed June 25, 1964).
- 20. The facts of this case fall squarely in the latter category of cases dealt with in the above-noted quote from *Ontario Hospital Association (Blue Cross)*. Although there has been no repre-

sentation vote, the second application was dismissed on its merits for reasons which were far from technicalities. To litigate the third application now would necessarily involve relitigation of some of the same facts and would prolong the period of instability which has already spanned six months.

- The collective agreement between the parties expired on June 30, 1995. There was no 21. attempt to dispute the pleaded facts relied on in the union's response indicating that Notice to Bargain had been given but no bargaining had taken place up until October. There is no suggestion that any has taken place since. It is unlikely any meaningful bargaining will take place until a period of stability takes place. The rights of the employees to have the representation issue heard was given full weight in the hearing and decision in the second termination application. That it was lost does not change the fact that it was heard on its merits. In the absence of special circumstances, after a determination on the merits of the representation issue, the balance tilts in favour of the other protected interest, that of the union and employer to bargain without the distraction of layers of litigation. There simply were no special circumstances or intervening events suggested that would tilt the balance back to recanvassing the representation issue recently dealt with by the Board in its November 9 decision. Nor was it suggested that the passage of Bill 7 had this effect. The applicants simply want their application considered again. This is not sufficient reason to prolong the period of uncertainty in this bargaining relationship. For these reasons, we are of the view that this application should not be entertained.
- The union also asks for a one-year bar. The Board can bar an unsuccessful applicant from bringing further applications, for a period of time not to exceed one year from the date of the dismissal of the earlier application. The question arises here as to whether Ms. Stoddart is an unsuccessful applicant. Her name did not appear on the application dismissed on November 9 or the one withdrawn on September 19, 1995. However, her original filing was framed identically to the earlier application and Ms. Stoddart made it clear at the hearing that this was a group of employees applying for the third time. As noted above, each of the names submitted in support of this application was also submitted in support of the dismissed application. There was no suggestion from Ms. Stoddart that the group should not be considered an unsuccessful applicant; rather, she made it clear that the purpose of bringing this third application was essentially so that the group might get a different result than that obtained in the Board's November 9, 1995 decision. In the circumstances, it is appropriate to find that Ms. Stoddart, on behalf of the group for which she was speaking, was an unsuccessful applicant in the previously dismissed termination application. In light of the provisions of section 67(2) set out above, that a one-year bar flows from the appointment of a conciliation officer, it is clear that the Legislature thought that a year from the date of the appointment of a conciliation officer was an appropriate amount of time to allow the parties to bargain protected from further termination or certification applications. Here, a bar under section 111(2)(k) would be coincident with much of that time, ending on November 9, 1996. It would in our view provide the stability the Legislature intended, uninterrupted by repetitive applications.
- 23. For the above reasons, the Board exercises its discretion under section 111(2)(k) to refuse to entertain this application. In addition, the Board hereby bars the applicant and/or the group for which she speaks from any new termination application before November 9, 1996, one year from the date of the dismissal of the earlier application.

4078-94-U; **4106-94-R** United Food & Commercial Workers International Union, Local 175 v. Vic Murai Holdings Ltd., Vic Murai, **Robert M. Heenan Sales Ltd.**, and Robert M. Heenan, Responding Parties; United Food & Commercial Workers International Union v. Robert M. Heenan Sales Ltd., Responding Party v. Group of Objecting Employees

Certification - Contempt - Employer Support - Evidence - Membership Evidence - Practice and Procedure - Board rejecting various motions, objections, allegations, requests and submissions made by employer and objecting employees, including objection to composition of the panel, submission that Board without jurisdiction to schedule certification application to be heard on consecutive day basis, allegations of abuse of process and of discrimination made against union, request that Board refuse to entertain application pursuant to section 105(2)(i) of the Act, objection to propriety of Form A-4 and to membership evidence filed by the union, and allegation of employer support for application contrary to section 13 of the Act - Certificate issuing - Board also critical of conduct of objecting employees' counsel and employer's counsel - Counsels' conduct throughout proceeding described as rude, interruptive, and intentionally disrespectful to tribunal - Counsel directed to attend before the Board to show cause why Board ought not to state case of contempt to Divisional Court or report counsels' conduct to Law Society of Upper Canada

BEFORE: Lee Shouldice, Vice-Chair.

APPEARANCES: John Stout, Kelvin Kucey, Bill Kalka and Greg Logue for applicants; Arthur P. Tarasuk, Diane Hodder and Robert M. Heenan for responding parties Robert Heenan and Robert M. Heenan Sales Ltd.; no one appearing for Vic Murai and Vic Murai Holdings Ltd.; Cyril J. Abbass for group of objecting employees.

DECISION OF THE BOARD; February 20, 1996

I. Introduction

These Board files are, first, an unfair labour practice complaint alleging a breach by the responding parties of section 65 of the *Labour Relations Act* ("the Act") and, secondly, an application for certification. A panel of the Board (differently constituted) ordered that these matters be heard together by way of decision dated March 9, 1995. These proceedings consumed 20 hearing days. As it is of relevance, I propose to outline the history of these proceedings at the outset of these reasons for decision. These two proceedings were commenced prior to October 4, 1995, and therefore the certification application was determined pursuant to the terms of the Act, and not the *Labour Relations Act*, 1995.

II. Substantive Matters

(a) Background Facts

2. It is important at the outset to outline, at the very least, a general overview of the background facts to these Board files. On January 12, 1995, the United Food and Commercial Workers International Union, Local 175 (hereinafter "Local 175") applied for a certificate to represent certain employees of a Canadian Tire franchise store located at 1000 King's Highway, Fort Frances, Ontario. At the time of that application the corporate entity which operated the franchise was Vic Murai Holdings Ltd. (hereinafter "Murai Holdings"). Murai Holdings filed a response to the application. Furthermore, one Mr. Niles Landherr filed, through his solicitor, Mr. Cyril J. Abbass,

a document styled "Wish to Participate", prior to the expiry of the terminal date. This application was given Board file number 3606-94-R. The matter was to come on for hearing on February 13, 1995.

- 3. On February 10, 1995, Mr. Abbass wrote to the Board and alleged that the membership evidence filed in support of the application made by Local 175 was, in fact, membership in the United Food and Commercial Workers International Union (hereinafter "the International"). In accordance with long-standing Board jurisprudence, counsel submitted that an application in the name of Local 175 could not be successful and urged the Board to dismiss the application. On February 13, 1995, this letter was forwarded by the Board to Mr. Kucey, on behalf of the International. Furthermore, by way of letter dated February 8, 1995, counsel for Murai Holdings (Mr. Tarasuk) wrote to the Board and, amongst other things, advised the Board that one Mr. Robert M. Heenan was in the process of purchasing the Canadian Tire franchise store in question, and that, accordingly, notice of the proceedings ought to be provided to Mr. Heenan. At the time, counsel for Murai Holdings was not acting for Mr. Heenan or Robert M. Heenan Sales Ltd. (the latter entity hereinafter referred to as "the employer").
- 4. As noted above, Board File 3606-94-R was scheduled to come on for hearing on February 13, 1995. On Friday, February 10, 1995, after 6:00 p.m., Mr. Kucey left a telephone message for Mr. Tarasuk at his office indicating that Local 175 had filed with the Board an unfair labour practice complaint (ultimately Board File 4078-94-U, which is before this panel of the Board). At the outset of the hearing on February 13, 1995, before a different panel of the Board, some discussion ensued regarding the proper course of the proceeding. Mr. Kucey, on behalf of Local 175, proposed that the unfair labour practice complaint filed on the previous Friday be heard with the application for certification then before the Board, and that it be heard immediately. For obvious reasons, that proposal was not acceptable to the Board.
- 5. Ultimately, it was decided to adjourn the certification application to February 20, 1995. At that time, the parties proceeded with argument on what the parties agreed was the strongest argument raised by the group of objecting employees, namely the nature of the membership evidence filed by Local 175. Full argument was heard on the issue, and the Vice-Chair seized of the matter reserved his decision at the end of argument until 9:30 a.m. the next day. At that time, when the parties had reconvened, the Board indicated that a decision had not been reached. The Vice-Chair spoke with the parties and queried as to whether a third option was available rather than an "all or nothing" result. Local 175 was aware that a withdrawal request at that point would almost certainly result in dismissal, having regard to the point in time that the request would be made.
- 6. Ultimately, Local 175 sought leave to withdraw its application, and the application was dismissed. (No decision was ever rendered on the issue of the nature of the membership evidence). However, at the same time that it was preparing to withdraw its certification application, the *International* filed an application for certification with the Board relating to this workplace (Board File 4106-94-R, with which this panel of the Board is seized). A request was made to transfer the membership evidence from Board File 3606-94-R to the new Board file, and that was subsequently effected by the Board. The matter was processed, and the employer responded to the application. Mr. Niles Landherr once again filed a "Wish to Participate". The application for certification and the unfair labour practice complaint came on for hearing before this Vice-Chair of the Board on Monday, March 20, 1995, the hearings to continue from day-to-day until completed or otherwise disposed of.
- 7. At the outset of the hearing of these matters, counsel for the employer and counsel for

the group of objecting employees raised a number of motions to be dealt with by the Board. These matters were dealt with in an order that made sense to the Board and oral rulings with or without reasons were delivered at appropriate times during the course of the proceedings. This decision records those rulings and contains the reasons for the rulings made.

(b) Notice to Vic Murai and Vic Murai Holdings Ltd.

- 8. The first issue dealt with by the Board was whether proper notice of the unfair labour practice complaint had been served on Mr. Vic Murai and Murai Holdings. The Board file indicates that the appropriate documentation, including a Notice of Hearing, was sent to Mr. Tarasuk, as counsel, and to Mr. Murai and Murai Holdings on February 27, 1995 by way of first class mail. At the hearing, Mr. Tarasuk raised the issue of notice (as he had done in a letter to the Board previously). Mr. Tarasuk, in response to a question from the Board, advised that his retainer with Mr. Murai had ended on February 13, 1995 once Mr. Murai had sold his business, and that his final account to Mr. Murai had been sent on February 14, 1995. He also stated that he had been retained by Mr. Heenan, on his personal behalf and on behalf of the employer, on February 16 or 17, 1995. He stated that he had not spoken to Mr. Murai since February 13, 1995 and that Mr. Murai had left the province, and currently resides in Manitoba. Accordingly, when served on behalf of Mr. Murai and Murai Holdings on February 27, 1995, he no longer acted for these two persons and it was not otherwise evident that notice had been served.
- 9. Mr. Heenan, who was present at the hearing that day, advised the Board that his store had received materials from the Board, addressed to Mr. Murai and Murai Holdings, and that administrative staff in his offices had put the materials, unopened, with other correspondence into larger envelopes and mailed them to Mr. Murai at his personal address in Dauphin, Manitoba.
- 10. After entertaining argument from the parties, the Board ruled that proper notice of the unfair labour practice proceeding had been provided to Mr. Murai and Murai Holdings. Section 115(1) of the Act provides as follows:

115.-(1) For the purposes of this Act and of any proceedings taken under it, any notice or communication sent through Her Majesty's mails shall be presumed, unless the contrary is proved, to have been received by the addressee in the ordinary course of mail.

A plain reading of this provision, when applied to the facts of this case, leads to the conclusion that Mr. Murai and Murai Holdings have, presumptively, received notice of the hearing scheduled for Board file 4078-94-U. There is no other evidence before the Board to suggest that notice was not received by these two parties. Therefore, in accordance with the provisions of section 115(1) of the Act, the Board ruled that notice of the hearing had been received by Mr. Murai and Murai Holdings, and that the proceeding would continue.

(c) Composition of the Panel

11. Counsel for the employer and counsel for the group of objecting employees submitted in argument that this panel of the Board was not composed appropriately, having regard to the requirements of the Act, and in particular section 104(12) 2(i) of the Act, which reads as follows:

104.(12) Despite subsections (9), (10) and (11), the chair may sit alone or may authorize a vice-chair to sit alone in any of the following circumstances to hear and determine a matter and to exercise all the powers of the Board when doing so:

(f)the chair considers that the possibility of undue delay or other prejudice to a party makes it appropriate to do so.

This Vice-Chair of the Board was assigned to hear this matter alone by the Chair of the Board, by way of written authorization dated March 20, 1995. In this case, the reason for the authorization was that the Chair considered it appropriate for a Vice-Chair to hear these matters alone in light of the possibility of undue delay due to the large number of days anticipated to complete the hearing.

- 12. The issue raised by counsel has been dealt with by the Board on at least three separate occasions. In *Robert Dumeah*, [1994] OLRB Rep. June 655, the Board made the following observations:
 - 7. The statutory scheme set out in subsections 104(12) and (12.1) of the Act grants to the Chair (or Alternate Chair) a discretion in determining the composition of the Board in a particular proceeding. The exercise of this discretion is an executive act, made on a purely administrative basis.
 - 8. The instant complaint relies upon numerous sections of the Act, which fall under different parts of section 104(12). Under section 104(12)1, applicable to proceedings brought in respect of sections 69 and 70, amongst others, the Chair is given the authority to sit a Vice-Chair alone where the Chair considers it advisable to do so, or if the parties consent. In the case of any other proceeding (section 104(12)(2)), the Chair's discretion can be exercised where the Chair considers that the possibility of undue delay or other prejudice to a party makes it appropriate to do so, or if the parties consent. It is common ground that the parties did not here consent.
 - 9. There may be occasions where scheduling problems or other difficulties in constituting a tripartite panel can lead to undue delay or other prejudice to a party. One purpose of these new legislative provisions was to deal with this problem, to provide the Chair with the ability to ensure that Board hearings proceeded expeditiously, consistent with the truism that "labour relations delayed is labour relations denied". It would be inconsistent with that purpose if the Chair had to afford an opportunity to parties to a proceeding to participate in the decision as to whether a single Vice-Chair sits alone or not. Parties would have to be given adequate notice of the decision of the Chair that she might exercise her discretion, a meaningful opportunity to participate in the process, and arguably, reasons for the Chair's eventual decision. To read the statutory scheme as requiring such a process would undermine the very purpose of the scheme. Hearings would inevitably be further delayed if the Chair considered exercising her powers to reduce delay.
 - 10. Section 104(12)1 limits the Chair's discretion to where the "Chair considers it advisable". This is a general, unrestricted discretion which in essence depends upon the Chair's opinion. And it is only the "possibility" of undue delay or prejudice which need be present under section 104(12)2. The powers in this subsection are thus dependent, if at all, upon the opinion of the Chair as to whether a possibility of undue delay or other prejudice is present. It is the mere possibility that triggers section 104(12)2, and it is solely the Chair who is to consider this possibility.
 - 11. When the particular language is considered, in the context of the overall scheme for constituting panels, and in light of the purpose of the Board and of section 104(12), the decision exercised by the Chair, pursuant to section 104(12), is properly characterized as purely administrative in nature. The Chair need not provide an opportunity to the parties to the proceeding to participate in this decision, nor is the Chair required to issue written reasons justifying the exercise of her discretion. To require either of these actions would effectively defeat the very purpose of the statutory amendment. Accordingly, I ruled at the hearing that the case would proceed before me.

Subsequently, in *Consumers' Distributing Company Limited*, [1995] OLRB Rep. Mar. 250 (applications for judicial review dismissed on May 24, 1995), the Board stated the following in response to a similar argument:

6. At the stage of proceedings at which the Chair's decision was made, the parties were con-

templating calling as many as 15-20 witnesses over almost as many hearing days. Given the prior commitment of Board Members to other proceedings, and the usual exigencies of the scheduling process, assembling a three-member panel in these circumstances could have meant a hearing that would take months, rather than weeks, to complete. In labour relations matters, that kind of delay, occasioned solely by the scheduling process, is undesirable; in the context of certification proceedings, it is untenable.

7. In Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) et al [1993] 2 S.C.R. 230, Cory J. recently commented [at pp.306 and 307] on the importance of expedition in the resolution of labour relations disputes, as follows:

Unresolved disputes fester and spread the infection of discontent. They cry out for resolution. Disputes in the field of labour relations are particularly sensitive. Work is an essential ingredient in the lives of most Canadians. Labour disputes deal with a wide variety of work related problems. They pertain to wages and benefits, to working conditions, hours of work, overtime, job classification and seniority. Many of the issues are emotional and volatile. If these disputes are not resolved quickly and finally they can lead to frustration, hostility and violence. Both the members of the work force and management have every right to expect that their differences will be, as they should, settled expeditiously. Further, the provision of goods and services in our complex society can be seriously disrupted by long running labour disputes and strikes. Thus society as a whole, as well as the parties, has an interest in their prompt resolution.

Legislators have recognized the importance of speedy determination of labour disputes. By the enactment of labour codes they have sought to provide a mechanism for a fair, just and speedy conclusion of the issues. The legislators have gone further and attempted to insulate the decisions of the various labour boards, tribunals and arbitrators from review by the courts. In earlier times, the courts resisted legislative attempts to restrict their ability to review the decisions of various labour boards. However, over a period of time they have accepted the vital importance of labour tribunals and adopted a more restrained approach in reviewing their decisions.

Expressed in the context of arbitral proceedings, these comments apply with even greater force to certification applications where the very right to representation hangs in the balance.

8. It is an unhappy fact of our system of labour relations that organizing campaigns are frequently divisive affairs, pitting not only employer against union but employee against employee. Persons who have exercised their statutory rights by expressing their wishes in favour of unionization fear retaliation from the employer, and employees who have opted not to do so may be ostracized, or worse, by their colleagues. In the short run at least, the result is an often pathologically divided workplace which is sharply at odds with certain of the purposes of the Act (e.g. the promotion of "harmonious labour relations" set out in section 2.1). It is for reasons such as these that the Legislature made a number of recent amendments to the *Act* which are designed to ensure expedition in the resolution of disputes (see e.g. sections 92.2 and 104(14)), and which include section 104(12).

Finally, the comments of the Board in *Bannerman Enterprises Inc.*, (unreported, Board File 0262-94-R, April 18, 1995), at paragraphs 6 and 7 should also be noted:

- 6. It is said that the Board was without jurisdiction to hear and determine this application as there was not a quorum as required by section 104(9) of the *Labour Relations Act*. This matter was heard by a Vice-Chair sitting alone pursuant to a designation by the Chair of the Board dated May 24, 1994.
- 7. This matter was fully argued prior to the commencement of the merits of this matter and the motion to reconstitute the panel was dismissed. Since January 1, 1993, section 104(1) has been subject to section 104(12) which gives the Chair the discretion to sit Vice-Chairs alone in certain circumstances. We are not of the view that section 104(12) requires that the Board seek submis-

sions or consent of the parties prior to the Chair's exercising her discretion in a particular case. I adopt the reasons set out in *Robert Dumeah*, [1994] OLRB Rep. June 655 on this issue, and agree that to read the statutory scheme as requiring such a process would undermine the very purpose of the scheme: expedition. . . .

This panel of the Board is in agreement with the views contained in these decisions.

- Counsel for the employer and counsel for the group of objecting employees made certain other submissions which ought to be specifically dealt with. Mr. Abbass, who had written to the Board regarding many issues, including the composition of the panel, asserted that he was entitled to a hearing before the Chair of the Board, in order to make submissions on the issue of "undue delay or other prejudice", the criteria contained in section 104(12)2(i) of the Act. He requested on numerous occasions that the Board advise him when the Chair would be delivering reasons for her decision. Mr. Tarasuk also asserted that he was entitled to a hearing before the Chair. He went so far as to state that the hearing should be one of judicial style, in which testimony would be given and argument made. Alternatively, Mr. Tarasuk submitted that a Labour Relations Officer could be utilized to record the evidence (and, presumably, a prepared transcript would be provided to the parties and argument would follow before the Chair).
- 14. These arguments must fail. As noted in the above three decisions of the Board, the authority vested in the Chair which is contained in section 104(12) of the Act is authority of a purely administrative nature, and is one that is exercised at the sole discretion of the Chair. Certainly, parties who wish to make representations prior to any decision made by the Chair are entitled to make same by way of correspondence addressed to the Chair. However, the decision as to the composition of a panel of the Board is one for the Chair to make, and it is unnecessary for a hearing of any kind to be held prior to his or her decision. Nor is it necessary that "reasons" for his or her decision be provided to the parties. This approach is entirely consistent with the concept of "fairness" relied upon by counsel for the employer, as reflected by the case of *Nicholson v. Regional Municipality of Haldimand Norfolk* (1975), 88 D.L.R. (3d) 671 (S.C.C.). To satisfy the requirement of "fairness", it is not necessary to afford the parties an oral hearing on the matter. One of the criteria which is expressly contained in the subsection for consideration by the Chair is that of "undue delay". The "trial type" structure asserted by counsel would be utterly contradictory to the purpose of the section of the Act. It is, quite simply, manifest from the legislation that the structure proposed by counsel is inappropriate.
- 15. For these reasons, this motion was dismissed by the Board.

(d) Nature of the Proceedings and Venue

- 16. Counsel for the employer and counsel for the group of objecting employees next brought a motion in which it was asserted that the Board was without jurisdiction to sit on these matters on a Monday to Thursday, "day-to-day" basis. In substance, counsels argument went thusly: The Board, in the decision of *Hemlo Gold Mines Inc.*, [1993] OLRB Rep. Mar. 158, described the Board's practice concerning the location and nature of its hearings regarding applications for certification as follows:
 - 11. As regards the request that the hearing be held in Thunder Bay, it should be noted that the location in which a Board hearing is to be held is an administrative matter for determination by the Registrar, in consultation with the Chair of the Board. In order to expedite the hearing of certification applications and certain other highly time-sensitive matters, the Board has administratively extended the fast-track hearing system (which is mandatory for certain section 91 complaints by virtue of section 92.2 of the *Labour Relations Act*) to include certification cases and those other time-sensitive matters. Thus, certification cases (including the instant case) are scheduled to be heard on consecutive days, excluding Fridays, Saturdays, Sundays and holidays,

until the hearing is completed, or as otherwise directed by the Board (which, under Rule 34, may adjourn a case on such terms as it considers advisable if it considers that the adjournment is consistent with the purposes of the Act). Funding and personnel limitations render it impossible for the Board to schedule fast-track cases outside of Toronto, as the system involves having on standby for fast-track and other expedited cases a rotating pool of Vice-Chairs and Board Members who, as cases settle or finish being heard, are frequently re-assigned to other urgent matters, often on a rush basis which would not be possible if a fast-track panel were in a location away from Toronto such as Thunder Bay. (Within the limits of its resources, the Board accommodates the legitimate interests of parties in minimizing the time and cost of their involvement in certification proceedings by scheduling and holding Labour Relations Officer's settlement meetings (such as the one held in Thunder Bay on February 17, 1993, in respect of this application) in regional centres such as Windsor, Ottawa, and Thunder Bay.

Furthermore, section 104(14) of the Act, clauses 1-4, provide for expedited hearings as follows:

104. (14) The Board may make rules to expedite proceedings to which the following provisions apply:

- 1. Section 11.1 (rights of access), 73.1 (replacement workers), 73.2 (use of specified replacement workers) or 92.1 (interim orders).
- 2. Subsection 93(1.2) (jurisdictional disputes) or 108(2).
- 3. Sections 119 to 138.
- 4. Such other provisions as the Lieutenant Governor in Council by regulation may designate.

Counsel submits that it is apparent that the sections of the Act relating to applications for certification, being sections 6 to 10, are not found in section 104(14) of the Act. Accordingly, applications for certification are not capable of being subjected to the expedited hearing process unless a regulation is passed designating sections 6 to 10 of the Act as being subject to the expedited hearing rules. No such regulation having been passed, the expedited hearing process is "null and void" and the Board cannot continue to hear this proceeding on a "day-to-day" basis.

- 17. In the Board's view, this argument must fail, and it was so ruled during the hearing. Any consideration of the scheduling of Board proceedings must commence by referring to sections 104(13) and 104(13.1) of the Act, which read as follows:
 - (13) The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceeding to present their evidence and to make their submissions.
 - (13.1) The Board may make rules governing its practice and procedure and the exercise of its powers and prescribing such forms as it considers advisable.

There is no doubt that the Board has a great deal of latitude respecting the governance of its own practice and procedure, including the scheduling of hearings. There is nothing contained in section 104(14) of the Act which detracts from that. Section 104(14) of the Act merely provides that the Board may make special rules respecting the hearing of certain stipulated proceedings before the Board. In point of fact, the Board's Rules of Procedure contain particular rules respecting applications relating to replacement workers, rights of access, and interim orders, amongst other things (see Rules 94 to 108). Subsection 104(14) of the Act does not speak at all to the ability of the Registrar of the Board to schedule matters for hearing, be it on a "day-to-day" basis, or otherwise. In that regard, with the exception of matters which are specifically directed by the Act to be heard within a fixed number of days of the application (see, for example, statutorily expedited proceedings pursuant to s. 92.2 of the Act, and construction industry grievance arbitrations pursuant to

section 126 of the Act), the Registrar is free to schedule proceedings before the Board in the manner that she feels is appropriate in all of the circumstances.

- No "rule" has been passed by the Board requiring that matters such as those before this panel of the Board be heard on an "expedited" basis, as is clear from a cursory glance of the Board's Rules of Procedure. However, the Board recognizes, as has the Supreme Court of Canada in Dayco (Canada) Ltd., supra (cited at paragraph 7 of the Consumers Distributing Company Limited decision, supra), that it is critical for particularly divisive labour relations matters (such as applications for certification) to be dealt with as quickly as is reasonably possible. Accordingly, the Board has typically scheduled applications for certification to be heard on a "day to day" basis. As noted above, there is nothing in the Act precluding such scheduling by the Board. Merely because this proceeding is scheduled from day-to-day does not make it an "expedited" proceeding as defined by the Act.
- 19. With respect to the venue of the Board hearing, that decision is an administrative one for the Registrar of the Board, to be made in consultation with the Chair of the Board. In this particular case, the matter was scheduled to be heard in Toronto, and the parties, in correspondence, requested that the Board direct that the matter be moved to Fort Frances. The Registrar of the Board determined, with the input of the Chair, that it was appropriate to maintain these proceedings in Toronto. This panel of the Board subsequently entertained argument on this issue when it was raised by the parties during the hearing. There was no significant reason raised to suggest that the proceeding necessarily had to be heard in Fort Frances, except for the question of the attendance of two particular witnesses, which is discussed in greater detail below. (In point of fact, the hearing proceeded for ten hearing dates without *viva voce* evidence on the matters in dispute). Accordingly, this motion was dismissed.
- At this point in the proceedings, Mr. Abbass requested that the Board adjourn the proceedings in order to provide reasons for the "bottom line" decisions reached to that date. The Board indicated to Mr. Abbass that, in accordance with Board jurisprudence (see, for example, Royalguard Vinyl Co., [1994] OLRB Rep. June 775), it was not inclined to do so. Mr. Abbass continued to press for an adjournment and it was ruled at that point that the proceedings would not be adjourned. Immediately thereafter, Mr. Tarasuk repeated Mr. Abbass' request. Mr. Tarasuk asserted during this discussion that the Board had prejudged the argument made because of a comment made by the Vice-Chair regarding the "day-to-day" scheduling of this matter, and demanded reasons for the decision. Once again, Mr. Tarasuk was advised that the reasons would follow, as they have, in accordance with section 17 of the Statutory Powers Procedure Act and the above authority, which reflects the Board's general practice.

(e) Abuse of Process

- 21. Subsequent to the above-noted ruling, the Board indicated that it wished to deal next with a number of issues relating to the unfair labour practice complaint. Mr. Kucey, on behalf of Local 175, advised the Board that he had received instructions from his client to seek a withdrawal of the unfair labour practice complaint. This, he asserted, was to expedite the disposition of the certification application.
- 22. Not surprisingly, counsel for both the employer and the group of objecting employees strongly opposed this request. Each asked that the application be dismissed, with costs. The Board ultimately reserved on this decision, and requested counsel to provide written submissions regarding the issues of abuse of process and that of costs. At that time, counsels' attention was directed to the decision of *Bellai Brothers Ltd.*, [1994] OLRB Rep. Jan. 2, regarding the jurisdiction of the Board to award costs. Subsequently, all counsel agreed to argue the abuse of process matter in

conjunction with other allegations of abuse of process which had been made by counsel for the employer. Counsel withdrew their request for costs.

- Accordingly, the parties agreed to deal with the allegations of abuse of process. The Board inquired as to whether it would be possible, in light of the highly detailed pleadings filed by counsel for the employer, to reach an agreed statement of facts which could be utilized for the purposes of this motion. Although counsel could not do so on their own, after a great deal of discussion with the Board a large core of agreed-to-facts were established. Shortly before a brief recess, the Board asked Mr. Abbass and Mr. Tarasuk to enumerate any further facts for agreement by the applicant that each would want to assert on behalf of his respective client or clients for the purposes of this motion. A number of facts were identified by counsel. Eventually each clearly indicated that he had completed this exercise, and had no further facts that he wished to rely upon. Mr. Kucey, on behalf of the applicants, indicated that he had difficulty agreeing to many of these further allegations of fact asserted by counsel.
- Upon resumption of the hearing after the recess, the parties were asked to argue the abuse of process allegations on the basis of the agreed-to facts, and on the basis that the disputed facts put forth by Messrs. Tarasuk and Abbass were true and provable. The Board indicated to the parties that, if any of the "disputed facts" had a bearing on the Board's decision, one way or the other, then evidence would necessarily be required to be called to establish those facts. Otherwise, the decision would be rendered on the basis of those facts which were agreed to and those which reflected the "best case scenario" for the employer and the group of objecting employees. Mr. Kucey and Mr. Tarasuk, on behalf of their respective clients, agreed to this procedure. Mr. Abbass did not. He asserted that this process was "ludicrous". Counsel were nevertheless directed by the Board to make their arguments commencing on the next day of hearing.
- During the course of argument on this motion Mr. Abbass, on numerous occasions, alleged that he had been denied natural justice and/or the right to establish facts through cross-examination. Such an assertion cannot be sustained. At one point during argument, Mr. Abbass asserted unfairness because during the establishment of the "agreed and assumed" facts he was not finished when the Board had stopped him from talking. Mr. Abbass was advised at the time that that was not the case. Prior to the recess referred to above, the Board continually asked both Mr. Abbass and Mr. Tarasuk if either had any further factual assertions he wanted to make in support of the motion. Each offered a number of factual assertions and then advised the Board that he was finished. There is no doubt that this matter was argued on the facts that Mr. Abbass specifically advised the parties and the Board that he wished to assert, and that he would have been satisfied with had the applicants agreed to stipulate them. It was only during argument when he wished to assert a new fact that he felt might be helpful that his protestations were made. Many of the facts asserted by Mr. Abbass were not pleaded by any party and could therefore have been (but were not) rejected by the Board pursuant to Rules 14 and 20 of the Board's Rules of Procedure.
- 26. Finally, before outlining the argument and reasons for ruling on this motion, it should be noted here that the parties were advised that the Board would not rely on any facts raised by the parties that were not agreed to or assumed true as a result of the process referred to above. That approach has been maintained, except to the extent specifically noted. All counsel relied on the existence or omission of certain factual assertions during argument, but then on occasion urged the Board to take "judicial notice" of certain facts supportable of their own case. To the extent that certain facts are notoriously true, the Board was willing to take notice of them.
- 27. The facts which were agreed to for the purposes of this motion are largely taken from the employer's pleadings and read as follows:

- The United Food & Commercial Workers International Union, Local 175 applied for certification with respect to the same employees prior to the sale of the business to the Respondent. Said Application being processed as Board File No.: 3606-94-R.
- o The Applicant, United Food & Commercial Workers International Union, Local 175 and the Applicant in the instant Application were formally apprised of the preliminary objection by letter from the objectors dated February 10, 1995.
- The said Application was scheduled for Hearing on February 13, 1995.
- At the February 13, 1995 Hearing the Board asked the parties to clearly identify a number of preliminary objections that had been raised with respect to said Application.
- o In response to the Board's request the objections identified were inter alia an objection that the Applicant, United Food & Commercial Workers International, Local 175, was relying on membership evidence in the name of United Food & Commercial Workers International Union.
- At that time the Applicant resisted the objection on the grounds that the membership evidence was in fact in the name of the Applicant, United Food & Commercial Workers International Union, Local 175.
- The Hearing was adjourned for unrelated reasons and was rescheduled for Hearing on February 20, 1995.
- At the February 20, 1995 Hearing the Board asked the parties to make submissions with respect to the objection that the Applicant, United Food & Commercial Workers International, Local 175, was relying on membership evidence of the United Food & Commercial Workers International Union.
- In the course of these submissions with respect to this preliminary objection counsel on behalf of the Applicant, United Food & Commercial Workers International Union, Local 175, opposed the substance of the objection and all assertions or notions that the membership evidence with respect to the Application Board File No.: 3606-94-R was membership evidence with respect to United Food & Commercial Workers International Union. He further asserted on behalf of the Applicant that the membership relied on in that Application was membership evidence in United Food & Commercial Workers International Union, Local 175.
- Representatives of the objectors and the Respondent Employer agreed to the holding of a "Representation Vote" however, the Applicant rejected resolution of the said Application and then argued preliminary objection by way of a "Representation Vote".

- The Applicant, United Food & Commercial Workers International Union, Local 175, further agreed that a sale of the business had occurred between Vic Murai Holdings Ltd., the Employer and Respondent, with respect to Application Board File No.: 3606-94-R and Robert M. Heenan Sales Ltd., the Respondent with respect to the instant Application.
- ° The Applicant, United Food & Commercial Workers International Union, Local 175, did not attempt to amend the Application nor did the Applicant request to amend the Application, nor did the Applicant in the instant Application seek intervention status even though the Applicant, United Food & Commercial Workers International Union, Local 175, with respect to Board File No. 3606-94-R [sic].
- The instant Applicant and/or the Applicant, United Food & Commercial Workers International Union, Local 175 Application Board File No.: 3606-94-R elected to reject a proposed "Representation Vote", elected to accept dismissal of the Application Board File No. 3606-94-R and has subsequent to the dismissal of the Application Board File No. 3606-94-R elected to apply the membership evidence that had originally relied on in Board File No. 3606-94-R in the instant Application, evidence of the membership that the Applicant categorized as evidence of membership in United Food & Commercial Workers International Union, Local 175.
- Board File 4016-94-R was filed with the Board on February 21, 1995 at 11:44 a.m.

The facts that were assumed to be true, for the purposes of this motion, are the following:

- At the beginning of a break on 21 February, 1995, an L.R.O. was involved in the process. Through the officer, it was agreed that a vote be ordered, but the union was to get instructions on section 91 only. Mr. Abbass was led to believe this.
- The union was not considering the vote, merely repreparing and refiling an application and representations were made to the Board that they were considering a vote.
- o It was the union's position in Board file 3606-94-R that the cards were memberships in the Local. They argued they were not ambiguous, or memberships in both the Local and International, and that they were Local cards.
- o Mr. Kucey did not limit his comments to this being a Local card at the hearing. His position was, at least, that it was a Local card and not ambiguous that it was a Local card. That was made in response to assertions that it was an International card. At no time did Mr. Kucey assert that the membership card stood for both Local and International membership.

- o Mr. Kucey argued his case on one card but it turned out there were 2 cards. One was different.
- ° The receipt portion of a card was not produced, at the outset of the proceeding.
- After hearing argument on the above agreed facts, and the facts assumed true for the purposes of the motion, the Board recessed and, upon resumption of the hearing, provided the parties with the following decisions and reasons for the decisions:

Before me is a motion to dismiss Board file 4106-94-R, an application for certification. The employer and the group of objecting employees assert that the applicant, because of its conduct, and the conduct of its solicitor, ought to be precluded from automatic certification, at the very least, or have the application dismissed. I note here that some of the submissions regarding abuse of process have been taken into account with respect to the disposition of Board file 4078-94-U in which the applicant in that file has requested leave of the Board to withdraw the complaint.

I have, after a thorough review of my notes of argument, identified 22 separate assertions of conduct which constitute an abuse of the Board's processes. They range from quite serious allegations of misconduct on the part of the applicant, to more insignificant allegations such as the proposition that counsel's submissions on a particular assertion is, itself, an abuse of process.

Counsel placed before me a number of judicial and Board authorities which provide examples of conduct which constitute abuses of process in the civil and criminal courts and, of course, before the Board. I have reviewed all of the decisions; each is helpful in its own way as a description of what type of conduct can constitute an abuse of the Board's processes. It is evident from the Board's jurisprudence that no one definition has ever been established - each case is determined by reference to the facts before the Board. Counsel referred me to the following authorities: Central Hospital [1971] OLRB Rep. Feb. 93; Repac Construction & Materials Limited [1976] OLRB Rep. Oct. 610; Canron Ltd., Eastern Structural Division [1977] OLRB Rep. Jan. 34; Southern Express Lines of Ontario Limited [1988] OLRB Rep. Oct. 1107; Fitzhenry & Whiteside Limited [1987] OLRB Rep. April 504; Toronto Housing Labour Bureau [1987] OLRB Rep. Sept. 1178; Amarcord Carpenters Ltd. [1989] OLRB Rep. June 531; R v. Osborn [1969] 1 O.R. 152 (C.A.); R v. Miles Music Ltd. (1989), 48 C.C.C. (3d) 96 (O.C.A.); R v. Power (1994), 89 C.C.C. (3d) 1 (S.C.C.); and Sterzik v. Beattie (1985) 16 Admin. L.R. 75 (Alta.O.B.).

I will not be making reference to each of the allegations of abuse of the Board's processes made by counsel during argument. At this point, it suffices to say that the allegations centre around three separate events; first, the preparation, timing, filing, substance and carriage of Board file 4078-94-R. Secondly, counsel's conduct during the proceedings in Board file 3606-94-R, in as much as counsel for the applicant is asserted to have misled both the Board and the parties to that proceeding regarding the applicant's intentions regarding certain discussions respecting a possible representation vote. Thirdly, issue is taken with certain aspects of the refiling of the application for certification before me; that is, Board file 4106-94-R. I note here that the allegations of abuse respecting Board file 4078-94-U were made in lieu of written submissions previously directed by the Board respecting the proper disposition of that Board file - that is, to permit leave to withdraw the complaint, or to dismiss it.

In reaching the decisions I have, I have taken into account all of the facts agreed to by the parties, as well as those facts which were assumed to be true for the purposes of the motion. In that regard, the moving parties' have had this motion argued on its "best case". In fact, I will go further and state that much of what was argued went beyond the "best case", and I have considered those assertions which were made by counsel for the moving parties which were provable by reference to the Board files, or which were not controversial.

With respect to the first matter, that being the circumstances relating to Board file 4078-94-U, I must say that I am troubled by some aspects of the applicant's conduct. The complaint was, by

all indications, filed without counsel's having had an opportunity to speak to a witness, was provided to the solicitors for the parties on the first day of the hearing in Board file 3606-94-R (it was also formally filed that same morning), and, not surprisingly, contained very few material facts supporting what counsel conceded were serious allegations regarding the conduct of the responding parties and, indirectly, their counsel, as well as the counsel for the group of objecting employees. A review of the transcript [of that hearing made by counsel for the employer which all parties conceded was an accurate reflection of the proceedings] makes it quite evident that, notwithstanding counsel's reservation of his client's right to file further particulars, and an indication (though not an undertaking) that further particulars would be filed "in a timely manner", no such particulars were ever delivered. Moreover, when the matter came before me on March 20, 1995, and in the face of a number of motions scheduled to be argued respecting the complaint, counsel did not seek leave to withdraw the matter until the Board indicated a desire to proceed with the various pending motions.

It is clear to me, from the transcript relied upon by the parties, that counsel for the applicant in Board file 4078-94-U was aware that the complaint required significant particulars before it would become a properly pleaded complaint. None were given. I note here that, in my view, the subject matter alleged by the complaint is not, per se, an abuse of process to plead. However, on the balance of probabilities, and on the basis of the pleading and the transcript admitted into evidence by the parties, I am satisfied that the complaint was brought to misuse the Board's processes to gain a tactical advantage in the pursuance of the applications for certification (first in Board file 3606-94-R, and then in Board file 4106-94-R). It is evident from the pleading that the pursuance of the complaint would likely have required one or both of Mr. Tarasuk or Mr. Abbass to retain legal counsel, thereby creating a needless expense to these solicitors. Keeping in mind that both counsel have, on behalf of their respective clients, raised a large number of "defences" to the applications for certification, I am satisfied that the unfair labour practice complaint was initiated solely for tactical reasons. It is evident to me that the applicant in that Board file never intended to pursue the complaint before me. Accordingly, I find that the preparation, timing and filing of Board file 4078-94-U is an abuse of the Board's processes. It is, accordingly, dismissed. As both counsel bringing this motion indicated that costs were no longer being requested, I need not deal with that issue.

As noted earlier, the moving parties also allege that certain aspects of the carriage of the unfair labour practice complaint constitute an abuse of the Board's processes. Although I have certain concerns regarding the conduct of the union, assuming that the "assumed facts" are true, and provable, I do not think that they can constitute an abuse of the Board's processes. Assuming, for the purposes of this motion that the "assumed facts" are factually provable, in light of the transcript which the parties agreed would reflect what was, in fact, stated before the Board, it is not evident to me that the presiding Vice-Chair in Board file 3606-94-R was, as was alleged in the pleadings "charging" the union to consider a representation vote. My reading of the transcripts suggests that the presiding Vice-Chair inquired as to whether, as a remedial response to a finding by him contrary to the union's position taken at the hearing, a representation vote would be appropriate (see, in particular, pp.164 and 165, and especially 166 and 167). The presiding Vice-Chair specifically stated that he had had difficulty with the issue and that he had not made any decision as at that time. Ultimately the parties did address the Board regarding the potentiality of such a vote. However, I don't believe that the Vice-Chair, at anytime, put the union "to the election" of a representation vote. Accordingly, even assuming that no such consideration of the vote concept was undertaken by the union, it can hardly be said that such inaction is an abuse of the Board's processes.

It was further submitted that withdrawing the application in Board file 3606-94-R (or, more properly, requesting leave to withdraw) while at the same time refiling a further application in the name of the International Union, and counsel's silence in this regard at the hearing also constituted an abuse of the Board's processes. I disagree. Counsel need not, and in fact ought not, disclose his client's strategic decisions, unless his or her client so authorizes. Parties before the Board regularly withdraw applications and refile new ones (though typically in different circumstances as here) and this is not, in itself, an abuse of the Board's processes. I note here that it was asserted in argument that I could infer or "read between the lines" of the transcript to conclude that the presiding Vice-Chair was telegraphing to the applicant that it was going to lose. In all fairness, I don't find that the message asserted is as clear as is submitted, especially in light of my comments earlier - that is, that the presiding Vice-Chair's request was remedial in nature,

not in the nature of a charge. I further note that I do not agree that it was an "abuse of process" to refile rather than to "amend" the identity of the applicant. The union had that option, but it was not the only option available to it. Whether it has chosen the correct one is yet to be seen.

I noted earlier that I did have some concerns regarding the conduct of counsel respecting the carriage of this matter. It is evident from the transcript and the Board time stamp on the application for certification that counsel for the applicant did, in fact, advise the presiding Vice-Chair that his client was seeking instructions regarding the possibility of a representation vote when, in fact, the current application for certification before me had been filed. The transcript makes it clear that all in attendance at the hearing would have been reasonably led to believe that a representation vote was an option then being considered. In light of the refiling (and the request that the membership evidence in Board file 3606-94-R be transferred to the new file) it is an inescapable conclusion that a misrepresentation was being made at that time. I should note, however, that at the same time counsel suggested that instructions were also being sought to withdraw the application (which he conceded was tantamount to a dismissal in the circumstances). The subsequent Board file may well have been anticipated by that comment; that is, the possibility of refiling was not *entirely* masked by counsel's comments.

In my view, even if I were to assume that counsel's entire motivation for his comments regarding the vote was to mislead the Board and counsel present, such conduct does not constitute an abuse of the Board's processes. It is clearly something which is improper to do; it is also on an entirely different level, ill-advised, as, in the labour relations community, one's word is only as good as his or her reputation as being a "straight shooter". Conduct of this sort lowers counsel's reputation throughout the community. However, it is not, in my view, an "abuse of process" in circumstances such as these to mislead the Board or others at a hearing. Nor, as it was suggested, is it an abuse of the Board's processes to make counsel wait for two hours while the refiling of the application was being effected.

Accordingly, I am of the view that the carriage of Board file 4078-94-U does not evidence an abuse of the Board's processes, and I so find.

Finally, I deal with the submissions that certain aspects of the refiled application for certification (Board file 4106-94-R) evidence an abuse of the Board's processes. In my view, these can all be dealt with in short order, as none of them truly reflects an abuse of process, though certain arguments may well be of more substance later in the hearing. For example, it was submitted that the filing of two forms A-4 (one in each certification file) reflects an abuse of process because one is clearly in error. Assuming that this latter conclusion is accurate, the argument is premature, and is more properly made as a substantive claim during the hearing. It is not an "abuse of process" to argue that "membership evidence" is a Local card in one hearing and an International card in another, particularly where no determination has yet been made on the issue. I find it hard to equate advocacy of alternative positions to constitute "abuse of process"; it would certainly inhibit free speech as amongst the legal profession. I note here that counsel for the union did not assert the proposition made by the moving parties during his argument . . . that he was asserting that the membership cards were International cards. However, until there is a determination made, any assertion can be made before me.

It is not an abuse of the Board's processes to require by one's conduct the same arguments to be made in two different Board files. Nor is it an abuse of the Board's processes to refile an application for certification without advising or seeking the consent of applicants for membership. Finally, it is not an abuse of process to err in the production of materials ordered produced prior to the hearing, or to improperly name the responding party, even if the union had become aware of the employer's name earlier in the week. In that regard, the substance of the application form makes it clear that the employer was identified and that there was no intent to deceive anyone at all.

Accordingly, I am of the view that there is nothing inherently abusive of the Board's processes in the filing, substance or carriage of Board file 4106-94-R, and I so find. I dismiss the motion brought by the employer and the group of objecting employees, in that regard.

I have read to the parties these reasons for decision as I am of the view that some guidance may be gleaned from them. I do, however, want to record one further reason why I would have dis-

missed this motion in its entirety, even if the preparation, filing and timing of the unfair labour practice were to have had some bearing on the application for certification. The conduct complained of by the employer and the group of objecting employees is that of the United Food & Commercial Workers' International Union, Local 175, which is the applicant in the unfair labour practice complaint and in the original application for certification, Board file 3606-94-R. The entity which would be affected by the requested relief is the United Food and Commercial Workers International Union, an entirely separate and distinct entity (although both are clearly affiliated). The authorities provided by counsel do not support the proposition that an abuse of the court's or the Board's processes committed by one entity can affect the rights of a totally separate entity - whether they share legal counsel, or otherwise. In light of the seriousness of the concept of abuse of process - and, of course, its consequences - the limitation that the consequences of that improper conduct fall on the shoulders of the entity that acts in an improper manner is hardly challengeable. Accordingly, even if each and every fact assumed were true and provable in its entirety, and even if I were to assume that those facts established abuses of the Board's processes, the conduct complained of does not emanate from the applicant in Board file 4106-94-R, and, accordingly, I would have dismissed the motion on that account.

(f) Imposition of a Bar/Refusal to Entertain

- 29. Both counsel for the employer and counsel for the group of objecting employees asserted that the Board ought to bar the applicant from bringing this application, or refuse to entertain the application, on various grounds. Reliance was placed on section 105(2)(i) of the Act, which reads as follows:
 - 105.-(2) Without limiting the generality of subsection (1), the Board has power,
 - (i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing the employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application.
- 30. There was no evidence called in support of this motion. At the outset of his argument, Mr. Abbass indicated that he would assume, for the purposes of argument, that none of the evidence before the Board on the abuse of process motion would be before the Board on this motion. Mr. Tarasuk, at the outset of his argument, asked that the Board's interim decision of March 9, 1995 be considered by the Board. There was no objection by opposing counsel to this request. Mr. Abbass took from the interim decision that a finding of fact had previously been made by the Board that this application was in respect of the "same employer" and covered the "same group of employees" as was involved in Board file 3606-94-R. At the request of Mr. Tarasuk, the parties agreed that, during the course of the second hearing date on Board File 3606-94-R, the responding party and the group of objecting employees were willing to drop all of their claims regarding the propriety of the membership evidence filed with the Board for the purpose of agreeing to a representation vote. It was also agreed that the applicant in that Board file was given the opportunity to describe itself on any ballot to be used in a representation vote as either Local 175 or as the International.
- 31. Strictly speaking, there was no other evidence before the Board for the purposes of this motion. However, both counsel for the employer and counsel for the group of objecting employees often made reference to facts which had earlier been agreed to for the purposes of the abuse of process motion for example, it was assumed throughout this motion that all of the membership evidence in the file before this panel of the Board was the same membership evidence that was before the Board in Board File 3606-94-R, which was a fact agreed to in the "abuse of process"

motion. Where it has been necessary to do so, therefore, the Board has not ignored, as Mr. Abbass referred to in argument, "the entire fact situation".

- 32. In essence, counsel for the employer and counsel for the group of objecting employees assert that the Board should bar the International from applying for certification or that it should refuse to entertain this application for certification for the following reasons:
 - (a) the application relates to the "same employees" and the "same employer" as in Board File 3606-94-R;
 - (b) the applicant in Board File 3606-94-R, Local 175, ought to have amended its application rather than having requested a withdrawal;
 - (c) Local 175 and the International, together, chose to apply in the name of Local 175 in Board File 3606-94-R;
 - (d) a "period of stability" ought to be afforded to the employees;
 - (e) the Board cannot "close its eyes" to the full day of argument made on the membership evidence issue in Board File 3606-94-R, and to order a representation vote would limit any further waste of time and expedite the proceedings;
 - (f) an abuse of process was found in Board File 4078-94-U, which was heard together with this matter, and the linkage between the International and Local 175 is just too close to ignore;
 - (g) Local 175's request for withdrawal in Board File 3606-94-R was merely an attempt by it to avoid certain defeat on a representation vote that would have been ordered by the presiding Vice-Chair in that file; and
 - (h) the same membership cards are being used in this proceeding as in Board file 3606-94-R. Membership evidence cannot be utilized in this fashion.
- 33. Counsel for the International submitted that the employer and the group of objecting employees were attempting to use section 105(2)(i) of the Act in a punitive manner, and that because the applicant in this Board File was a different entity than that in Board File 3606-94-R, the Board's jurisprudence permitted the International to reapply and to have the Board entertain the application.
- 34. Counsel for the applicant, in argument, relied upon Repla Limited, [1990] OLRB Rep. May 612; Elm Tree Nursing Home, [1978] OLRB Rep. Nov. 984; and The Clorox Company of Canada Ltd., [1980] OLRB Rep. Feb. 184. The employer and the group of objecting employees relied upon Ontario Hospital Association (Blue Cross), [1981] OLRB Rep. Apr. 468; Browning-Ferris Industries Ltd., [1982] OLRB Rep. Sept. 1253; The Children's Aid Society of Owen Sound and the County of Grey, [1984] OLRB Rep. July 995; Amarcord Carpenters Ltd., [1989] OLRB Rep. June 531; and Goodfellow Inc., (Board File 3003-94-R, January 6, 1994, unreported).
- 35. The Board's jurisprudence on the issue of the application of a bar and the refusal to entertain subsequent applications for certification establishes that there is no legitimate reason for

the Board to apply a bar to this applicant or to refuse to entertain this application for certification. In point of fact, the case authorities relied upon by counsel for the employer and by counsel for the group of objecting employees, to the extent that they were in fact relevant, support such a conclusion. Mr. Abbass, during argument, referred chiefly to cases involving applications for termination of bargaining rights, and extracted concepts and principles applicable in that context, asserting that they were equally relevant to the application of section 105(2)(i) of the Act. The Board does not agree. The context of a termination application, particularly a displacement application, reflects an entirely different dynamic than the situation before the Board. The principles relied upon just do not apply as easily as was asserted during argument.

- The Board's earlier decision in *Repla Limited*, *supra*, accurately reflects the Board's practice with respect to the application of a bar and the refusal to entertain an application for certification. In that case, a local trade union affiliated with the United Brotherhood of Carpenters and Joiners of America brought an application for certification before the Board. A representation vote was ordered by the Board and the vote lost by the local union. The application for certification was, therefore, dismissed. In accordance with the Board's general practice, the local union was barred from any further application for certification respecting that same employer for a period of six months. Shortly thereafter, the parent union brought an application for certification before the Board respecting the same group of employees. The responding party urged the Board to not entertain the parent union's application.
- As was noted by the Board in *Repla Limited*, *supra*, section 105(2)(i) of the Act confers two distinct powers on the Board. One is the power to bar an "unsuccessful applicant" from making a subsequent application for certification for a period of up to ten months from the date of dismissal of its application. That power is typically exercised upon the dismissal of an application, and only affects the rights of the unsuccessful applicant. No bar was requested by the responding party or the group of objecting employees in Board File 3606-94-R. That file is not before the Board, nor is Local 175 a party to this proceeding. Accordingly, section 105(2)(i), to the extent that it permits the Board to bar an entity from applying for certification of the employer's employees, does not permit me to bar the International from applying, as it was not an "unsuccessful applicant" in Board File 3606-94-R.
- 38. With respect to the argument that the Board should refuse to entertain an application for certification by the International, the following excerpt from *Repla Limited*, *supra*, is applicable to these circumstances:
 - 9. Unions whose constitutions provide for creation of subordinate "local" unions are often referred to as "parent" unions. The Board has said it will treat a parent union as a "trade union" within the meaning of clause 1(1)(p) where employees are members of the parent union: Metal Textile Corporation of Canada Limited, (1955), 55 CLLC ¶18,016; Carleton Co-operative Milk Transport, [1970] OLRB Rep. June 305. The Board has also said that evidence of membership in a local union is (Cochrane-Dunlop Hardware Ltd., 63 CLLC ¶16,268) or may be (Lincoln Graphics Ltd.. [1969] OLRB Rep. Nov. 983) evidence of membership in the parent union. A bar imposed on a local union under clause 103(2)(i) has not been treated as a bar to application by its parent union, nor has the Board refused to consider a subsequent application by the parent of an unsuccessful applicant in circumstances in which a subsequent application by an unrelated trade union would have been entertained: Elm Tree Nursing Home, [1978] OLRB Rep. Nov. 984, (See also The Clorox Company of Canada Ltd. [1980] OLRB Rep. Feb. 184, where an application by a local was entertained during period of bar on applications by parent and Creeds Storage Ltd., [1984] OLRB Rep. May 712, where an application was entertained during period of bar imposed on the applicant's sister local.) The Board has treated a parent union and one of its locals as distinct trade union entities for other purposes, such as a successorship application under section 62: The Hydro-Electric Commission of the City of Hamilton, 62 CLLC ¶16,261.

The critical observation made by the Board in *Repla Limited*, for the purposes of this case, is that the Board has not refused to consider a subsequent application for certification by the parent of an unsuccessful applicant in circumstances in which a subsequent application by an unrelated trade union would have been entertained. The Board has always treated a parent union and one of its affiliated local unions as separate entities.

- In that respect, the Board did not have before it during the course of argument either the International's Constitution or the By-Laws of Local 175. However, counsel for both moving parties did not dispute, during argument, that the International and Local 175 were a parent union and an affiliated local union, respectively. It is clear from past Board jurisprudence that Local 175 is, in fact, a local affiliated union of the applicant (see, for example, *Knob Hill Farms Limited*, [1989] OLRB Rep. Feb. 149). In fact, during argument it was suggested that the close relationship between the two separate entities ought to be a factor in favour of the motion. Furthermore, counsel did not suggest that the International or Local 175 had not previously established trade union status before the Board. During the course of subsequent argument the Constitution of the International and the By-Laws of Local 175 were entered into evidence as agreed-to exhibits. These documents confirm the above status of the two entities, and make it evident that members of Local 175 also hold membership in the International. Although these constitutional documents were not before the Board during this motion, they clearly confirm the relationship between the two trade unions which was assumed by the parties.
- 40. The ultimate disposition of this motion can be dealt with by reference to the principles set out in *Repla Limited*, above. Assuming that the instant application relates to the "same employer" and the "same employees" as in Board File 3606-94-R, such a fact is of no relevance to this application for certification, in light of the different identity of the applicants in both Board files. Likewise, the finding of an abuse of process by Local 175 in Board File 4078-94-U can hardly affect the rights of the International in the certification proceeding. Assuming that the membership evidence is of a nature that properly supports a parent union's application for certification, it is not improper for membership applications to be utilized in a subsequent application brought by a local union's parent.
- With respect to the argument regarding the "wasting" of a full day's argument before the panel that heard Board File 3606-94-R, the inefficient use of Board resources is of course, an unfortunate matter but is not something which, if relevant at all, can be detrimental to the International, which is an entirely different entity than the applicant in Board File 3606-94-R. There is absolutely no evidence before the Board to suggest that Local 175 and the International, together, chose to apply for certification in Board File 3606-94-R in the name of Local 175. And with respect to the submission that Local 175 ought to have merely amended its application in Board File 3606-94-R, rather than requesting a withdrawal of its application, the local union may well have had such an option, but if so it was not the only option open to it.
- With regard to the submission that a "period of stability" be afforded to the employees, this is one of the considerations taken into account by the Board in displacement applications that counsel for the group of objecting employees asserted ought to be applicable to certification applications. In point of fact, the case authorities suggest that "disruption" is *not* a factor to be taken into account by the Board when considering the applicability of section 105(2)(i) of the Act. In Amarcord Carpenters Limited, supra, the Board notes, at paragraph 12, the following:
 - 12. If a major objective of the Board in exercising its power under clause 103(2)(i) [as it then was] were to minimize disruption caused by votes, however, one would expect the Board to refuse to entertain *any* trade union's application if it were filed soon after the post-vote dismissal of another trade union's application. That has not been the Board's practice when there is no

incumbent trade union. The Board's willingness to entertain one trade union's application immediately after another's has been dismissed following a vote cannot be explained by focusing on the first applicant's having caused the disruption, as that explanation would have the Board exercising the discretion under clause 103(2)(ii) [as it then was] in a punitive fashion, contrary to the approach described by the Board in *Hydro Electric Commission of Hamilton*, [1958] 58 CLLC ¶18,120, and *The Watson Manufacturing Company of Paris Limited, supra*.

It is to be noted that the above comment is referable to the situation where a representation vote had been ordered by the Board, and had been taken. The degree of "disruption" in that context is far greater than could be expected by a two-day Board hearing, resulting in a dismissal of a certification application, and a subsequent application for certification.

- Finally, regarding the suggestion that the applicant in Board File 3606-94-R was "anticipating defeat" and, therefore, withdrew the application for certification, as noted earlier the Board does not understand the comments made by the presiding Vice-Chair in Board File 3606-94-R in the same manner as do counsel for the moving parties. Assuming, solely for this argument, that Local 175 did "see the writing on the wall", that it anticipated that the Vice-Chair would determine the issue argued against it, and that it would be required to participate in a representation vote that it would subsequently lose, there are two separate observations to be made. First, as noted above, Local 175 was the applicant in Board File 3606-94-R. It would be inappropriate to attribute the decisions of the guiding minds of Local 175 during that proceeding to the International. Just as importantly, it is evident from the Board's long-standing jurisprudence that the Board may refuse to entertain a subsequent application only where the applicant seeks to avoid an unfavourable vote result by withdrawing its application following the ordering of a vote. Here, no such order was ever made.
- 44. Accordingly, for these reasons, the motion was dismissed at the hearing.

(g) Propriety of the Form A-4

- 45. Mr. Abbass next brought a motion in which it was asserted that the Form A-4 filed in this proceeding was deficient and, accordingly, could not be relied upon by the Board.
- 46. In support of the motion, certain facts were agreed to by the parties. The Form A-4 filed in Board File 3606-94-R and the Form A-4 filed in the instant application were made exhibits, as were the International's Constitution and the By-Laws of Local 175. After Mr. Abbass and Mr. Tarasuk argued this motion, the Board advised counsel for the applicant that it would be unnecessary to hear from him, and provided the parties with the following oral decision:

In my view, this motion must be dismissed. In my view, the argument made by counsel for the group of objecting employees singularly lacks any substance or merit. Absolutely none of the itemized matters in paragraphs 10A to 10G [of the objecting employees' pleadings] belong in a Form A-4. I am also not satisfied that the argument made by Mr. Tarasuk should be successful. The two Forms A-4 are not inherently contradictory. The A-4 declares that the documents represent "membership evidence" on behalf of a stipulated number of employees in the applied for bargaining unit. Nothing is required by the Form A-4 regarding a stipulation as to the nature of the cards - whether the cards are "Local" or "International" cards. Those matters need not be disclosed in the Form A-4, nor does the nature or extent of the organizing drive be detailed.

Finally, with respect to the argument that the Form A-4 refers only to "membership evidence", I refer counsel to Rule 43(c)[of the Board's Rules of Practice], which requires the filing with the application for certification of what is the Form A-4, and Rule 1(j), which defines "membership evidence" to include "written and signed evidence that an employee is a member of a trade union, has applied to become a member or has otherwise expressed a desire to be represented by a trade union." Accordingly, this motion is dismissed. Fuller reasons will follow.

Those reasons are set out below.

- 47. Mr. Abbass commenced his argument by discussing the significance that the Board places on the Form A-4. It was described by counsel as the "cornerstone" of the Board's certification process. The Board was referred to three cases by counsel: 599207 Ontario Inc., [1990] OLRB Rep. Dec. 1205; Kitchener News Company Limited, [1980] OLRB Rep. Nov. 1656; and Guelph Paper Box Company Limited, [1985] OLRB Rep. May 673. Reference was also made to the decision of Pebra Peterborough Inc., [1988] OLRB Rep. Jan. 76, which was quoted at length in the decision of 599207 Ontario Inc., supra.
- 48. There is no doubt that the Form A-4 is a "cornerstone" of the Board's certification process. If there is any legitimate question established as to the validity of the declaration made by the individual who signs the Form A-4 the success of the application for certification that it supports will be jeopardized. The following comments from *Pebra Peterborough Inc.*, *supra*, are reflective of the Board's approach to this most critical document:
 - 31. Paragraph 3 of Form 9 is the critical paragraph and it is important to understand what it does not require as well as what it does require. It requires that the declarant, in this case the applicant's President, be able to make certain declarations, based either on the declarant's personal knowledge or the inquiries that s/he has made. If the declarant signs the Form based on personal knowledge, then that knowledge must be sufficient to allow the declarant to make the declaration in paragraph 3. It must also be sufficient to ensure that the declarant is aware of any exceptions to the standard declaration. Alternatively, if inquiries are made of collectors and these inquiries form the basis upon which the declarant is possessed of the necessary knowledge, then the inquiries must be made prior to signing the Form and they must be reasonable. The declarant need not inquire with respect to every conceivable event or possibility, but s/he must have made reasonable attempts and reasonable inquiries. What is reasonable will depend on the circumstances and context, but it is clear that an inquiry must be made, whether in a question and answer or a less structured format. . . . [T]he declarant will not possess sufficient knowledge if s/he merely looks at documents, and (for example) compares each card with a receipt. The declarant must also know personally of the circumstances of the collection or make inquiries about them.
- 49. In this case, however, Mr. Abbass asserted that a number of different statements ought properly to have been included in the Form A-4. It was submitted that the Form A-4 was deficient and could not be relied upon by the Board unless it contained the following "facts":
 - ° the basis for the knowledge of the declarant; is it personal or from the two union organizers?;
 - that the membership card had the name of Local 175 on it's heading in bold print, but in fact it was an application to join the applicant;
 - o that the two organizers were in the Red Dog Inn in January when a number of cards were signed but they did not actually witness each signing of the cards.
 - o that the employees were advised that the documents they were signing were only applications for membership and that they would only become members of the union if and when the union was certified and that these applications were only valid for six months and gave the employees no membership rights under the union's constitution nor imposed any membership duties.
 - ° that the material sections of the applicant's Constitution were

explained to the employees prior to the signing of the membership documents, namely:

Articles 4A (B.1) (I) Article 5A Articles 8 D, E & F Article 18

- o that the employees who originally signed the membership evidence (if it is the same as the evidence in Board file 3606-94-R) were advised of the problems with the use of the evidence in that case and reaffirmed their understanding and desire to join the applicant.
- ° that the confusion on the part of the two organizers and the applicant was explained to the employees.
- o that the applicant has a practice of admitting employees to membership without regard to the eligibility requirements of its constitution, charter and by-laws.

During his argument, Mr. Abbass read to the Board, verbatim, large portions of the International's Constitution and the By-Laws of Local 175. Mr. Abbass asserted that numerous matters contained in these documents ought to have been included by the declarant in the Form A-4, including such things as the six different types of membership offered by the applicant, whether the employees were eligible to hold an office on behalf of the International, whether the employees could be charged and tried by an International tribunal, and whether copies of the applications for membership had been forwarded to the International Secretary-Treasurer as required by the Constitution. Mr. Abbass further argued that the identity of the trade union organizing the employees ought to be included in the Form A-4, as should a statement indicating whether all of the employees are paying dues, or initiation fees, and, if not, by what authority. Mr. Abbass asserted that dozens of other matters contained in the applicant's constitutional documents ought to have been disclosed on the face of the Form A-4. No authority was put before the Board to support these assertions. Instead, Mr. Abbass merely stated that the policy of the Board is reflected by key words such as "disclosure, personal integrity", "disclosure, explain, set out" or "integrity, disclosure, accuracy", which words he repeated over and over on numerous occasions.

- Mr. Abbass also submitted during argument that the Form A-4 declarant in this Board proceeding could not have made the proper inquiries required by the Board in light of the fact that the application and the Form A-4 were filed at 11:44 a.m. on February 21, 1995, during the hearing of Board File 3606-94-R; that is, that none of the individuals who had received the cards on behalf of the applicant could possibly have been canvassed prior to the execution of the Form A-4. Furthermore, Mr. Abbass submitted that there had been a material misrepresentation made in the Form A-4 because the cards "were solicited as and put forth as" Local 175 cards. Also, Mr. Abbass asserted that it is critical to note in the Form A-4 whether the documents filed in support of the application are applications for membership or actual memberships in the union. Mr. Abbass asserted that, in the face of the Board's jurisprudence, it was "almost impossible" to find the Forms A-4 filed in either Board File 3606-94-R or the instant proceeding to be satisfactory.
- Counsel for the employer limited his argument to two different propositions. First, counsel asserted that there had been an organizing drive related to the employer by Local 175, and that the International was not involved. Local 175, it was asserted, had no expectation that its initial certification application would run into difficulty. Counsel submitted that the By-Laws of Local

175 preclude an employee from having memberships in both the International and Local 175 at the same time, and that, therefore, the memberships were only in Local 175 when signed. Counsel noted that Local 175 had earlier asserted that the membership evidence submitted in support of its application in Board File 3606-94-R was evidence of membership in Local 175. In light of this, counsel asserted that if it were subsequently asserted that the membership evidence was in the name of the International, the applicant had an obligation to make this clear in the Form A-4. Counsel stated that it is not sufficient, in his view, for the applicant to unilaterally change the use of the membership cards filed with the Board. Any such change of use must be referred to on the Form A-4 in this proceeding. Furthermore, counsel submitted that the two Forms A-4 were inconsistent because they were filed in two different applications, state the same thing, and the applicant asserts that the membership evidence is a different thing in the instant Board File than it did in Board File 3606-94-R. Counsel's second proposition was that the Form A-4 did not (but ought to) distinguish between "applications for membership" and "membership", a proposition which was also argued by Mr. Abbass.

- 52. Before dealing with counsels' arguments, it should be noted here that the two Forms A-4 filed in the respective certification applications were executed by Mr. Daniel Onichuk. The form utilized is that provided by the Board. No exceptions are noted. In Board File 3606-94-R, Mr. Onichuk is described in the Form A-4 as a "Regional Director"; in the instant application, he is described in the Form A-4 as a "Representative".
- 53. Dealing first with Mr. Tarasuk's argument, it fails for a number of reasons. At the outset, the Board disagrees that the By-Laws of Local 175 preclude an employee from holding both membership in Local 175 and the International at the same time. The article of the By-Law referred to in argument by counsel states only that an individual cannot hold memberships of a different *classification* at the same time; for example, "active" and "inactive" membership could not be held by one person at the same time. In point of fact, the By-Laws of Local 175 and the Constitution of the International make it quite evident that membership in Local 175 is also membership in the International (see, in the International Constitution, Articles 4(A) and 4(I), and in the By-Laws of Local 175, Article IV. A. and IV. B).
- More fundamentally, however, the difficulty with counsel's argument is that, as noted earlier, the Forms A-4 were executed by Mr. Onichuk with respect to different applicants. In both Forms A-4 Mr. Onichuk asserts that, "to the best of [his] knowledge, information and belief" the documents submitted in support of the application represent "membership evidence" on behalf of a certain number of employees, and that "on the basis of [his] personal knowledge or inquiries [he has] made, the documents were signed by the employees indicated on the documents". Nothing is asserted by the declarant as to the nature or legal meaning of the membership evidence; that is, whether they are "International" memberships or "Local 175" memberships. Nor is such a statement required or expected of the A-4 declarant. But the documents are "membership evidence" no matter which entity or entities the documents relate to. Obviously, in light of the Board jurisprudence, if the membership evidence reflects membership in the International, then the application will be dismissed if brought in the name of an affiliated local. However, the determination of the legal status of the membership evidence is one for the Board to determine, should the issue be raised; it is not expected that laypersons opine as to the legal effect of the membership evidence filed when completing a Form A-4. For that same reason, there can be no legitimate challenge to the Form A-4 filed in the present application. The International, as a separate trade union, may now well assert that the membership evidence is evidence of membership in the International. It may or may not be correct. For the purposes of completing the Form A-4, that is of no importance. The critical matter for the Board is the assertion on the face of the Form A-4 that, because of the declarant's personal knowledge or because of inquiries made by the declarant, the membership

documents were signed by the employees indicated on the documents. In that regard, the two Forms A-4 are entirely consistent and unchallenged.

- With regard to the argument made by both counsel respecting the lack of distinction made on the Form A-4 between those cards reflecting "membership" status in the applicant, and those cards reflecting only "application for membership" status, that argument is answered quite readily by reference to Rule 43(c) of the Board's Rules of Procedure, which requires the filing of "a declaration . . . in the form set by the Board' with an application for certification, and Rule 1(j), which defines "membership evidence" to include both "membership" in a trade union and "applications for membership" in a trade union.
- Mr. Abbass' arguments set out above were entirely without merit. Mr. Abbass put forth no authority in support of the propositions asserted by him, except general comments or "buzzwords" of the nature referred to above. Taken to its logical conclusion, his argument would suggest that the Form A-4 would be a document of almost infinite length, including information regarding each and every aspect of the applicant's inner workings and the organizing drive. Quite simply, that proposition is patently untenable, and the Board does not believe, keeping in mind Mr. Abbass' self-described experience at the Board (including representation of trade unions: see Long Lake Forest Products Inc. (Board file 2952-93-R, unreported decisions dated December 14, 1994 and March 8, 1995)), that his assertions were made in good faith. This observation is made because there were, at times, allegations made by each party to this proceeding regarding the intention of one or more of the other parties to delay the proceeding. Some of the arguments made during this proceeding had, at least, some basic semblance of legitimacy, and accordingly they were entertained on their merits. These submissions by Mr. Abbass lacked any legitimacy, and in the view of the Board were put forth solely to delay the timely disposition of these proceedings. In fact, as a general observation, many of the arguments put forward by Mr. Abbass were, in my view, argued solely to delay the proceedings. This became quite obvious as the hearing progressed.

(h) Discrimination

- Mr. Abbass also asserted that the union, because it did not approach each and every employee in the bargaining unit to sign a membership application, violated sections 2.1, 3 and 13 of the Act, and that, accordingly, the application ought to be dismissed. No material facts in support of this allegation were contained in the pleading filed by Mr. Abbass on behalf of his client. When requested by the Board to outline the material facts replied upon, Mr. Abbass indicated he had none and was not prepared to proceed at that time on the allegation. When Mr. Abbass was advised by the Board that this particular motion would be dismissed if no material facts were immediately provided, Mr. Abbass asserted that the Board was "biased". Such an assertion was entirely unwarranted. The Board and the other parties are entitled to be informed of the material facts to be relied upon. After a great deal of discussion, the parties agreed upon a set of facts for the argument of the motion.
- The parties agreed to stipulate as fact that not all employees of the employer were approached by the union (nor did all of the employees approach the union) during the organizing drive. It was also agreed that the union had produced certain literature during the organizing campaign, a copy of which was made an exhibit to the proceedings. Finally, it was agreed that, between the time that Local 175 contemplated leave to withdraw Board File 3606-94-R, and the time that the International filed the instant Board File, no bargaining unit employee was made aware of Local 175's decision to ask the Board for leave to withdraw, and the International's decision to file, the two respective applications. All counsel agreed that the two Forms A-4 and the membership evidence in the instant application could be referred to during argument.

- 59. The statutory provisions referred to by the parties during argument are as follows:
 - **2.1** The following are the purposes of this Act.
 - To ensure that workers can freely exercise the right to organize by protecting the right of employees to choose, join and be represented by a trade union of their choice and to participate in the lawful activities of the trade union.
 - 2. To encourage the process of collective bargaining so as to enhance,
 - the ability of employees to negotiate terms and conditions of employment with their employer.
 - the extension of co-operative approaches between employers and trade unions in adapting to changes in the economy, developing work force skills and promoting workplace productivity, and
 - iii. increased employee participation in the workplace.

**

 To promote harmonious labour relations, industrial stability and the ongoing settlement of differences between employers and trade unions.

**:

- 4. To provide for effective, fair and expeditious methods of dispute resolution.
- **3.** Every person is free to join a trade union of the person's own choice and to participate in its lawful activities.
- **4.** Every person is free to join an employers' organization of the person's own choice and to participate in its lawful activities.
- 13. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or other administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the Human Rights Code or the Canadian Charter of Rights and Freedoms.
- of the Act, clearly address the issue of "choice", and that the concept of "choice" requires a clear choice between various options. Counsel submitted that the deprivation of something as significant as an employee's right to contract individually with his employer regarding the terms and conditions of his employment (a right that was described somewhat melodramatically by Mr. Abbass as being "fought for at Dunkirk" and "enshrined in the Charter of Rights") requires that a clear choice be provided. Mr. Abbass submitted that the employee, first, has to know what it is that he or she is choosing, and, secondly, has to have an opportunity to participate in the process. In that regard, counsel asserted that during the organizing drive the employees were only provided with an opportunity to choose "Local 175", and not the current applicant, the International. Furthermore, it was asserted that, by not approaching all of the employees, Local 175 had purposely avoided those who would oppose it. Counsel submitted that this precluded those opposed to the union from actively opposing the drive, contrary to the Act. As a remedy, counsel asked the Board to order a representation vote. Counsel read to the Board excerpts from *The Great Atlantic & Pacific Company of Canada, Limited*, [1993] OLRB Rep. Sept. 885 in support of his assertions.

- Counsel also asserted that section 13 of the Act had been violated by the applicant. Counsel queried during argument how the Board could be satisfied that the reason that some of the employees in the bargaining unit were not approached to sign cards was not based on a prohibited ground of discrimination contained in the *Human Rights Code*. When the Board questioned Mr. Abbass regarding the absence of any evidence of such discrimination and suggested that evidence supporting his assertions ought to have been adduced, Mr. Abbass asserted that it is the *Board's* responsibility to ensure that section 13 is satisfied. He subsequently asserted that the Board could "infer" that the individuals not approached by Local 175 were not approached because they were opposed to a union. The Board notes that opposition to a trade union is not a prohibited ground of discrimination contained in either the *Human Rights Code* or the *Charter of Rights*.
- Counsel for the employer took a slightly different approach to this preliminary motion. Mr. Tarasuk asserted in argument that, because sections 2.1, 3 and 4 of the Act all were incorporated into the Act at the same time that the Bill 40 amendments were made removing the prior relevance of the terminal date for representation purposes, it could be inferred that the provisions were intended to balance off each other. Accordingly, to balance off the restriction imposed on when employees can make a choice to join a trade union, there now has to be meaning given to the choice made by employees. Counsel acknowledged that actual notice to each and every employee of an organizing drive is unnecessary, but asserted that, as a minimum, the employees must be made aware (by, perhaps, a posted notice) that the "choice process" is before them; that is, that a trade union is organizing. It is then, according to counsel, that the choice of each employee to join, support or oppose the trade union can be properly made. Counsel noted that the current applicant had applied without providing any notice to the employees, and questioned how it could be said that all of the employees had a choice at all, especially when it is clear that some individuals in the bargaining unit were not even known to the applicant at the time the application was filed.
- 63. After entertaining this argument from counsel, the Board recessed briefly and returned to dismiss the motion without hearing from counsel for the applicant. Having regard to the agreed-upon facts, the argument of counsel, and the Board's jurisprudence on this matter, the Board was of the view that the motion ought to be dismissed. In *Hemlo Gold Mines Inc.*, [1993] OLRB Rep. Mar. 158, the Board made the following observations regarding a similar argument:
 - 26. There is also nothing in the Act which requires a trade union to give employees notice of its intention to file a certification application. Although the intervenors submitted in paragraph 21 of their intervention that the Union had an obligation under section 69 of the Act to give employees in the bargaining unit advance notification of the application date, at the hearing of this matter Ms. Gillespie indicated that the intervenors were no longer advancing section 69 as a basis for that obligation (presumably because it is clear from the wording of that provision that the duty imposed by section 69 only applies to a union "entitled to represent employees in a bargaining unit", i.e., a trade union which has bargaining rights for the employees by virtue of having been certified or voluntary recognized as their bargaining agent). We were not referred to any provision of the Act or applicable legal principle which would require the applicant to give advance notice to the employees (or to the Board) of its intention to file a certification application. Unions frequently organize through contact with some but not all of the employees of an employer. If it is to obtain certification without a representation vote (in the absence of contraventions of the Act making certification appropriate under section 9.2) a union will have to gain the support of over fifty-five per cent of the employees. However, it is under no obligation to contact all of the employees. A union may be unable to contact employees for whom it does not have an address or telephone number, or who are away on vacation or absent due to illness. Moreover, it may choose to intentionally avoid contacting employees who are known to be strongly opposed to unionization, or who are thought likely to notify the employer of any such contact. Employees who are not contacted by the union are treated by the Act (and the Board) as being opposed to unionization (by virtue of being included in the denominator but not in the

numerator of the fraction used to determine the count). The same is true of employees contacted by the union who decline to sign a union card. . . .

Subsequently, the Board reached the same conclusion in Bannerman Enterprises Inc., [1994] OLRB Rep. Nov. 1489:

64. The Board dismissed a number of allegations as disclosing no *prima facie* case at the outset of the hearing with brief oral reasons. They included the allegation that the union had not contacted everyone in the proposed bargaining unit. The union is not required to contact everyone; there is no requirement for full debate in the Act.

These observations were expanded upon in the Board's decision on reconsideration (unreported, dated April 18, 1995), at para. 9:

It can be seen that the freedom protected in these sections [sections 2.1 and 3 of the Act] is the right to join a trade union of one's choice and to participate in its lawful activities not "to participate in the choice of a trade union", as suggested in counsel's submissions. To the extent that counsel is suggesting that these sections require a longer campaign to allow every employee to be consulted and participate in the debate, we do not find support for that in the language of either section 2.1 or section 3.

I agree with all of these observations. Those employees in the bargaining unit who signed membership application cards exercised their "choice" to join or not to join a trade union prior to the initial application brought by Local 175. Assuming, for the purposes of this argument, that the employees believed that they were executing membership cards in support of Local 175, as a matter of law, the cards can be used by either that local union or by the International in support of an application for certification. Whether the employees knew of that state of affairs at the time they signed an application for membership is irrelevant; it is a legal incident of executing a local union's membership application that membership may also be held in the local union's parent, thus supporting a parent union's certification application. Accordingly, I dismissed the motion.

(i) Constitutional Matters

64. Mr. Abbass next indicated that he wished to make a further motion based upon a request for production contained in his client's pleading. At paragraph 14 of the pleading, counsel had requested from the applicant production of certain documents and information, including:

"a detailed statement of the material facts as to any practice the Applicant has of admitting employees to membership without regard to its Constitution, Charter and by-laws".

Reliance during argument was placed upon section 105(4) of the Act, which provides as follows:

105.-(4) Where the Board is satisfied that a union has an established practice of admitting persons to membership without regard to the eligibility requirements of its charter, constitution or by-laws, the Board, in determining whether a person is a member of a trade union, need not have regard for the eligibility requirements.

There was no assertion in the body of the "Wish to Participate" alleging that the existence or non-existence of a practice by the applicant of allowing individual's memberships in the applicant without regard to its eligibility requirements had any relevance to this proceeding. When this matter was initially discussed at the hearing Mr. Abbass referred the Board to the decision of *Municipality of Metropolitan Toronto*, [1994] OLRB Rep. July 938, in support of his allegation. Subsequently, when this preliminary motion was put squarely into issue by Mr. Abbass, the Board heard the submissions of the parties regarding whether the allegations ought to be entertained, in light of the

fact that it was not pleaded, and in light of the absence of even the barest of material facts in the "Wish to Participate".

- 65. Mr. Abbass stated that it was up to the applicant to establish *its* practice respecting the admission of persons to membership, and stated that his assertion was "clear" on the face of the pleading. Subsequently during argument, Mr. Abbass suggested that it was the *Board's* responsibility to ensure that this matter was properly placed before it. Mr. Abbass submitted that, without knowledge of the existence of or the lack of existence of the union's practice, he could not raise the matter in his pleading. Mr. Abbass indicated that his "best case" would be if the applicant were to acknowledge that it had no practice of admitting people to membership without reference to the eligibility requirements contained in its Constitution.
- Counsel for the applicant, Mr. Stout, observed, amongst other things, that the pleading filed on behalf of the objecting employees did not assert that the applicant had conducted itself in a manner which was contrary to the provisions of its Constitution. Counsel for the employer asserted that section 105(4) of the Act requires the Board to be satisfied that the applicant observes its constitutional provisions before it is certified, and that the union was not merely finding an expedient manner of having membership evidence placed before the Board. In response, Mr. Abbass asserted that the necessity to plead the matter would require him to make inquiries of individual employees in the workplace regarding the internal practices of the applicant, which he submitted could well constitute an unfair labour practice.
- After hearing argument on this matter, the Board reserved its decision. After a brief recess later that day, various rulings were provided. At that time, the Board determined that evidence would not be entertained with respect to this motion, on the basis that these matters had not been sufficiently pleaded. It is clear from the face of the pleading that the allegations raised by Mr. Abbass at the hearing were not specifically (or even generally) pleaded. There are clearly no material facts pleaded in support of any preliminary motion regarding this matter, and, in accordance with the provisions of Board Rules 14 and 20, the Board determined that it would not, at that late date, allow counsel to, in effect, raise an entirely new matter without having even pleaded it in general terms.
- The Board notes here (although it is, strictly speaking, unnecessary to do so) that both Mr. Abbass and Mr. Tarasuk appear to fundamentally misunderstand the purpose of section 105(4) of the Act. As is reflected by a plain reading of the Board's decision in *Municipality of Metropolitan Toronto*, *supra*, the provision is one which is intended to ameliorate the strict provisions of a union's constitution. In that case, the applicant, the Ontario Liquor Board Employees' Union, was constitutionally limited to the representation of Crown employees, employees of Crown agencies, and employees of "private sector" employers. That union applied to represent certain employees of Metro Toronto. An intervening trade union to the application asserted, ultimately correctly, that Metro Toronto was neither the Crown, an agent of the Crown, or a private sector employer. The applicant in that case asserted that section 105(4) of the Act could facilitate its application, inasmuch as it could establish that it had a practice of admitting into membership employees without regard to the eligibility requirements of its Constitution. Ultimately, it failed to establish that assertion, and the application for certification was dismissed.
- 69. In the case before the Board, whether the International does or does not have such a practice is unimportant until it is asserted and proved (by the party making the allegation) that the applicant cannot admit into membership certain individuals who have signed applications for membership, because of the provisions of its Constitution. No such assertion has ever been made, notwithstanding that Mr. Abbass did not dispute that he had, well in advance of the hearing, a copy of

the applicant's Constitution (albeit one that was outdated). Even if the applicant were to acknowledge that it had no practice of admitting individuals to membership without reference to its eligibility requirements, the moving party would still be required to assert and prove that some of the individuals applying for membership could not be made a member of the applicant because of the International's Constitution. It would not be necessary to speak to each employee to properly plead such as allegation. All that would be required would be for counsel to review the Constitution and to both assert *and establish* that certain classes of employees of the employer would not be eligible for membership in the applicant because of a constitutional provision. If this is in fact proved, the union would then be required to establish facts to satisfy section 105(4) of the Act should it wish to rely upon the membership applications submitted on behalf of those employees.

(j) Substantial Change in the Workplace

- After the Board reserved on the above-noted matter, the parties addressed a further matter raised in the "Wish to Participate" filed by the group of objecting employees. That document asserts that the applicant ought to be barred from applying for certification with the same membership evidence utilized in Board File 3606-94-R on the grounds that "there has been a substantial change in the workplace". No material facts were pleaded by the group of objecting employees. Mr. Abbass, at the request of the Board, was asked to outline those facts relied upon in support of the motion. After doing so, counsel for the applicant indicated that he could not agree to all of the facts asserted so as to permit argument on the basis of agreed facts, and the Board asked Mr. Abbass to address the issue of whether he ought to be permitted to proceed in light of Rules 14 and 20 of the Board's Rules of Procedure.
- Mr. Abbass asserted that the Board should not be "over technical" regarding pleadings, that the material facts were "evident", and stated that the Board had a "problem" if the facts were not clear to it; he further claimed that the material facts he was relying upon were "known to everybody". Counsel for the employer had no submissions on this issue. Counsel for the applicant indicated that he desired the party bringing this motion to call evidence supporting the allegations in light of the fact that he could not agree to a number of the assertions raised by Mr. Abbass. In response, Mr. Abbass indicated that if it were necessary for him to call evidence, he would be prepared to do so at the start of the next hearing day. Ultimately, after recessing, the Board ruled that the moving party would be allowed to rely upon the material facts asserted earlier that day, and, if necessary, would be required to call evidence to support the assertions. However, it appeared to the Board that most, if not all, of the facts relied upon could be subject to agreement, and the hearing was recessed at that time to allow counsel to discuss that possibility. Eventually, facts were agreed upon by the parties for the purposes of the motion.
- During argument on the issue of whether the moving party ought to be able to assert material facts for the purposes of this motion, Mr. Tarasuk somewhat abruptly asserted, for the first time, another theory regarding the abuse of process committed by Local 175 in Board File 4078-94-U. Counsel asserted that either Local 175 or the International may well have brought the instant certification application for the sole purpose of denying the employer the opportunity to operate without the existence of a "statutory freeze" in place. Mr. Tarasuk was asked if he was requesting that the Board reconsider its earlier decision; he indicated that he was not. However, he did question whether the Board ought to be considering a further "abuse of process" argument at that point. He also asserted that the Board ought to have raised the matter on its own motion, and that the parties were not required to. Eventually, after entertaining argument from other counsel, the Board indicated that the abuse of process issues were well behind the parties and that the Board would not hear further submissions on the matter. Mr. Tarasuk thereupon indicated he would withdraw his submission, if the Board were indicating that it was "not concerned" about the

allegation. After a subsequent recess, the parties were advised that the Board is *always* concerned about possible abuses of its processes. However, allegations of such a nature cannot be made frivolously. They must be properly pleaded, in a timely manner, and new theories relating to a previously argued matter cannot merely be "sprung" upon the other parties (and the Board) during the middle of a hearing.

- 73. The agreed-upon facts referred to above were filed with the Board. It was agreed that the franchise in question had changed ownership, by way of asset transaction, from Murai Holdings to the employer, and that Vic Murai no longer had anything to do with the operation of the business. It was also agreed that employees at the business have different lengths of service. It was agreed that the parties' agreement regarding the scope of the bargaining unit in Board file 3606-94-R (in which it was agreed that the Head Cashier was excluded from the bargaining unit) could be referred to during argument. On these agreed facts, the above-noted motion was argued.
- In essence, it was Mr. Abbass' argument that because the workplace was now "substan-74. tially different" than it was when the membership application cards were signed, the Board ought not to entertain this application. Counsel asserted that the workplace was different in a number of ways: a new employer had purchased assets of the former employer, Murai Holdings; accordingly, the common law contracts of employment had been terminated upon the sale and new contracts of employment now governed the relationships of the employees with the employer. Furthermore, the principal of the new employer was a different individual than the predecessor employer. Counsel asserted that the International's request that the Head Cashier be included in the bargaining unit in this application reflected a "change in management structure". A further difference was asserted because of the lack of knowledge the employees had regarding the certification process prior to Local 175's application, which did not now hold true; counsel asserted that the employees ought to have been given an opportunity to consider whether they wanted an international union to represent them. Mr. Abbass further asserted that the work force is now "treated" in a different way and has different "seniority". Finally, it was Mr. Abbass' assertion that, as the Act addresses successor employers in section 64, it would have been acceptable if the employer were a different entity for the purposes of this proceeding. However, when both the applicant and the responding party are different entities, there is reflected "a real substantial change" in the workplace.
- 75. Counsel for the employer had no submissions on this motion. After recessing, the Board advised counsel for the applicant that it did not need to hear from him on this motion. The parties were provided with the following oral ruling:

The group of objecting employees assert that I ought to refuse to entertain this application on the grounds that there has been a substantial change in the workplace. I do not believe that any substantial change in the workplace has been established, assuming, for the purposes of this motion, that even if such a change had been established, it would be a relevant factor in the exercise of the Board's discretion.

There is no evidence before me that there has been a substantial change in the workplace, as between the group of employees governed or affected by Board File 3606-94-R and Board File 4106-94-R - in point of fact, counsel, during a prior motion, relied upon the Board's interim decision of March 9, 1995 to assert that the Board had found as a fact that this application governed "the same employees" and "the same employer". It is evident that the same group of employees will be affected by the application before me. There is no suggestion or evidence that the nature of the workplace has changed; and the fact that this applicant has suggested that the Head Cashier be included in the unit is hardly indicative of a "substantial change in the workplace". Nor are the legal consequences of an asset sale relevant when considering the concept of "substantial change in the workplace", at least on the facts of this case where there is no evidence that any employee's employment was not "picked up" by the current employer.

It was argued that, in light of section 64 of the Act, it would not have been fatal for the applicant if it had applied to represent the employees of Vic Murai Holdings Ltd., on the basis that section 64 would apply to reflect the new name of the employer. It was asserted that, with a new applicant, though, this was a different matter. Oddly enough, the transcript filed in evidence and the argument of counsel on a previous motion suggests that (a) it was clear at the outset of Board File 3606-94-R that the employer's name had changed to Robert M. Heenan Sales Ltd. and (b) that counsel asserted that Local 175 ought to have amended its application to reflect the "International" as applicant in Board File 3606-94-R. The consequences of both (of these) facts would be that it would be satisfactory for the (application in) Board File 3606-94-R to be amended to read identically to Board File 4106-94-R, but it is not satisfactory if the application (in Board file 3606-94-R) is withdrawn by Local 175 and a new application is then filed by the International. I fail to understand the distinction. Accordingly, this motion is dismissed.

(k) Nature of the Membership Evidence

At this juncture, it was agreed that the Board would hear argument on the issue raised by both the employer and the group of objecting employees respecting the nature of the membership evidence relied upon by the applicant in Board File 4106-94-R. This is a matter which had previously been argued by counsel for the employer and counsel for the group of objecting employees before the panel seized with Board File 3606-94-R. A transcript of argument on that issue that the parties agreed reflected the argument made at that time had earlier been placed before the Board by the parties. Accordingly, counsel agreed that the Board should refer to that argument, augmented by their submissions. Counsel for the International made full submissions before the Board at the hearing. The Board has reviewed all of the above materials, the submissions of counsel, and has carefully read all of the cases referred to before it and referred to in the transcript.

The membership application before the reads t	77.	ership application before me reads	thusly
---	-----	------------------------------------	--------

Date	e:	19	
SIGNATURE OF RECEIVER		_	
Applicant Employee's Name & Home	Address		
	PRINT	•	
LAST NAME			
FIRST NAME			
ADDRESSTEL Apt. Number/Street			
CITYP/CODE			
EMPLOYER/COJOB			
DO YOU WORK MORE THAN 24 HI	RS. PER W	EEK?	YES/NO
	* * *		

I received this card from the person whose signature appears on the other side.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175

I hereby request and accept membership in the United Food and Commercial Workers International Union, and of my own free will hereby authorize the Union, its agents or representatives,

The issue to be determined is the nature of the membership application - is it one which is a membership application for the International, as was asserted in argument by counsel for the employer and counsel for the group of objecting employees, or is it one which is an application for membership in both Local 175 and the International, as was asserted by Mr. Stout, on behalf of the International. Alternatively, the document could be considered to be a membership application for Local 175.

- At this point it is appropriate to address a certain submission made by both Mr. Abbass and Mr. Tarasuk during argument. When this same issue was argued before the panel seized with Board file 3606-94-R, counsel for Local 175, Mr. Kucey, argued that the same document was clearly an application for membership in Local 175. Both Mr. Abbass and Mr. Tarasuk asserted that Mr. Stout, on behalf of the current applicant, could not now argue otherwise, and that the Board should not allow Mr. Stout to argue that the membership application is one for membership in both the International and Local 175. This submission is entirely without merit. Both counsel asserting this proposition conceded that the International and Local 175 were separate trade unions. In light of that concession, it is difficult to understand how it could be legitimately argued that counsel for the International should not be allowed to make different submissions on this issue than did counsel for Local 175 previously. Accordingly, counsel were advised that the Board would entertain Mr. Stout's argument.
- The nature of the membership application card is critical in this proceeding. As was noted above, the Board's jurisprudence establishes that an application for certification brought by an international or parent trade union can be supported by membership applications in an affiliated local trade union. Such an application for certification may also be supported by applications for membership in the international or parent trade union, if the Constitution of the applicant permits for such membership. In this particular case, it is evident from the Constitution of the International and the By-Laws of Local 175 that membership in the International is obtained, for "active members" at least (and there is no dispute that the employees in question would be admitted to membership in the applicant as "active members"), through Local 175; that is, that there is no such thing as an International membership application that would support an application for certification brought by the International.
- 80. Having reviewed the membership application card, the relevant Board jurisprudence, the exhibits before the Board, and having considered the argument of counsel, the Board is of the view that the application card in dispute is one which evidences an application for membership in both Local 175 and the International.
- 81. This is not the first time that the Board has considered the nature of a similar membership card. In *Oshawa Food Group Ltd.*, [1995] OLRB Rep. Apr. 477 the Board (differently constituted) made the following comments regarding an identical card (with the exception that the local union in question was Local 1977):
 - 59. Finally, we reject counsel's argument that the membership evidence should be rejected on the basis that the membership cards used by the applicant may have confused employees because they refer to both Local 1977 and the International. In *Chapleau Forest Products Limited* [1990] OLRB Rep. Dec. 1243, the Board was faced with a similar argument by the responding party in circumstances, such as those before us, where the top of the membership

application identified the Local Union but the body of the card identified the International. At paragraph 11, the Board observed as follows:

11. Since Local 1-2995 is the applicant, it is required to support the application with applications for membership in Local 1-2995. Applications for membership in IWA-Canada will not suffice. In effect, counsel for the respondent argues that the application for membership cards filed with the application only relate to IWA-Canada, or are at least so ambiguous that effect should be given to the bar imposed as a result of the previous application. The Board was satisfied that the documentary evidence filed with the application relates to the applicant and that reasonable employees would not have been confused by it. As in *Menkes Developments Inc.*, *supra*, the cards before us are applications for membership. In contrast to the cards used in the previous application, which referred only to IWA-Canada, the cards supporting this application refer clearly to Local 1-2995, the applicant. When one examines the membership cards as a whole, it is clearly an application for membership in both IWA-Canada and its Local 1-2995. It is for these reasons that the majority ruled that the applicant's documentary evidence of membership relates to employees who applied to become members of the applicant.

We agree with the test contained in the excerpt above; that is, would a reasonable employee have been confused by the membership application card. In the case before us, we think that a reasonable employee would have expected that he or she was, at the very least, applying for membership in the Local. The Local's name is bold faced on the card, and we are satisfied that reasonable employees would not have been confused by the card.

60. As the law has developed before this Board, evidence of membership in a local union is sufficient to support an application for certification brought by an international or parent union (see, for example, *Canada Valve Ltd.* [1980] OLRB Rep. Dec. 1727, and *Chapleau Forest Products Limited*, *supra*). Here the International has brought the application and can utilize the membership evidence relating to its Local affiliate.

A similar conclusion was reached by the Board in *Zellers Ltd.* (unreported, Board Files 4207-94-R and 4208-94-R, April 7, 1995). It was unnecessary, in the *Oshawa Food Group Ltd.* decision, for the Board to address the question of whether almost identical membership evidence went beyond an application for membership in the local union. In this case, the exact legal nature of the membership application has been put into issue.

82. A number of Board decisions were cited during argument. The case which most closely mirrors this one on its facts is *Chapleau Forest Products Limited* [1990] OLRB Rep. Dec. 1243 (judicial review to Divisional Court dismissed April 25, 1991; leave to appeal to the Court of Appeal denied September 23, 1991) where the membership application card in issue read as follows:

APPLICATION FOR MEMBERSHIP IWA-CANADA, LOCAL 1-2995 Affiliated with CLC (Please Print)

NAME	
ADDRESS	
CITY	
Employee of	
Birth Date	Phone

I hereby request and accept membership in the IWA-CANADA and of my own free will thereby authorize this union to act for me as the collective bargaining agency in all matters per-

taining to rates of pay, wages, hours of employment or other conditions of employment. I hereby certify that the amount shown below, was paid by me to be applied to initiation fees or monthly dues of the Union, and as evidence of good faith in my application for membership.

Amount — ONE—X/100 Dollars Date

Signature of Applicant

Signature of Receiver of above money

The Board made the following observations regarding the nature of that membership application card:

10. The majority of the panel, with W. H. Wightman dissenting, orally ruled at the hearing that it could find no basis for dismissing the application, having regard to the membership evidence filed by Local 1-2995. In circumstances virtually identical to those before us, the Board in *Menkes Developments Inc.*, supra, determined that the form of the membership evidence was a reliable indication that the employees who signed those cards were members of the applicant. The membership card in that case was different only to the extent that it had a receipt portion which specified the local union. In the majority's view, this is not a material difference. In response to an argument that the cards were ambiguous and were not sufficient to support certification without a vote, the Board wrote the following:

10. Evidence of membership in an International Union is not generally accepted by the Board as evidence of membership in a local thereof. (See for example Bernardin of Canada Limited, [1975] OLRB Rep. Oct. 737). However, membership in a local is accepted as evidence of membership in the parent international (see for example The Explorer Inns, Limited, [1978] OLRB Rep. June 541). In every case, however, the Board will examine the material facts and an apparent ambiguity in the documentary evidence will not be fatal provided that, as a whole, it points unequivocally to membership in the applicant (see for example Wallaceburg Hydro Electric Systems, [1975] OLRB Rep. Oct. 783; Union Electric Supply Co. Limited, [1983] OLRB Rep. May 829; General Motors of Canada Limited, unreported decision of the Board dated December 28, 1984 in Board File No. 2418-94-R). It was the Board's view that the documentary evidence filed in support of this application is sufficiently unambiguous for the Board to be satisfied that it relates to the applicant and that no reasonable employee would have been confused by it. The cards are clearly applications for membership. Further, both the application and receipt portions refer clearly to the applicant. The cards are clearly applications for membership in both the Labourers' International Union of North America and its Local 506. Accordingly, the Board ruled orally that the applicant's documentary evidence of membership is a reliable indication that the employees to whom it relates were members of the applicant.

(See also the excerpts above at para. 81). It should be observed here that the Board, in *Chapleau Forest Products*, makes reference in its decision to both *Menkes Developments Inc.*, [1987] OLRB Rep. Oct. 1290 and *Union Electric Supply Co. Limited*, [1983] OLRB Rep. May 829. These cases were also referred to by counsel before this panel of the Board.

83. Counsel for the employer distinguished the *Chapleau Forest Products* decision on the ground that the membership application card in question was entitled, at the top, "Application for Membership", and thus clearly was an application for membership in the local trade union referred to immediately beneath it. Counsel submitted that the absence of such a title on the card in question in this proceeding was fatal. With that one exception, there are no substantial differences between the card before the Board in the *Chapleau Forest Products* decision and the one before this panel of the Board. In both cases, the text of the card quite clearly evidences a request by the

individual signing the card that he or she be admitted to membership in the parent trade union, rather than the local trade union referred to at the top of the card.

- In the Board's view, the absence of the words "Application for Membership" at the top of the membership application card does not have the significance that counsel for the employer suggested during argument. Individuals faced with such a card would reasonably be aware that it was an "application for membership"; the presence or absence of those three words could hardly have a meaningful effect on the nature of the document signed. It is notable that the Board in *Chapleau Forest Products* did not specifically state that those three words were in any way determinative of the issue before it. Accordingly, the Board can see little, if any, distinction between the membership application card before the Board in *Chapleau Forest Products* and that before the Board in this proceeding. It is evident that the signer of the card could, quite reasonably, expect membership in both Local 175 and the International. Such a conclusion is consistent with the principle that Board decisions should themselves be consistent, in order to permit the labour relations community to guide itself by Board jurisprudence.
- 85. During argument both Mr. Tarasuk and Mr. Abbass submitted that "Board jurisprudence" established that only "the body" of the membership application card was relevant when considering the nature of the membership application. No cases were presented to the Board establishing that principle; in fact, the argument of counsel went well beyond "the body" of the membership application card to consider other factors. In the view of the Board, the entire card ought to be taken into account by the Board when considering the nature of the document and whether a reasonable employee would be confused by the card when reading it. It is unnecessary in this case to determine whether other materials, such as the campaign materials and the organizer's business cards (which in this case pointed towards membership in Local 175) are relevant, as the Board is of the view that the membership application cards, when considered in their entirety, evidence a desire to apply for membership in both Local 175 and the International. It should be noted here that the "receipt" portion of the membership card in this case pointed towards the conclusion that International membership was also being requested; it did not, however, detract from the conclusion that membership in Local 175 was also being requested by the signer of the card.
- 86. Accordingly, the Board is of the view that the membership application cards relied upon by the applicant in Board file 4106-94-R are membership applications in both Local 175 and the International.

(1) Misdated Membership Evidence

- During deliberations on the issue of the nature of the membership evidence, it came to the attention of the Board that one piece of membership evidence before it was dated "December 9, 1995", 10 months subsequent to the certification application date. This misdated card was brought to the attention of the parties on April 10, 1995. The card is said to have been witnessed on January 9, 1995, and otherwise appears to be properly completed. The Form A-4 filed with the Board does not, in paragraph 3, disclose this card as an exception. Counsel were requested to submits written argument on what, if any, consequences ought to occur as a result of these facts. Submissions from the applicant were received on April 13, 1995 and April 18, 1995; submissions from the other parties were received on April 13, 1995.
- 88. On May 9, 1995, the parties were provided with the following decision and reasons for decision:

I have considered all of the written submissions made by counsel in this proceeding, and I have read all of the authorities referred to and enclosed with the correspondence.

In my view, the error which is evident on the face of the card ought to have been disclosed in paragraph 3 of the Form A-4 filed with the Board. Although the Form A-4 does not specifically require the declarant to verify the dates upon which each membership application card is signed, the declaration does require that the declarant verify that the cards filed in support of the application are "membership evidence"; implicitly, this requires that the cards be properly dated. No matter how the card in question is interpreted (and there are, as Mr. Abbass noted, a number of possible interpretations of the card) it is not properly dated as required by Rule 48 of the Board's Rules of Procedure. There is no allegation before the Board that the omission of this discrepancy in the Form A-4 is anything more than an oversight. That being said, the discrepancy ought to have been disclosed in the Form A-4.

The parties have addressed the consequences which ought to result from the omission of the error on the membership card in the Form A-4. Counsel for the employer asserts that the application must be immediately dismissed. Counsel for the group of objecting employees concurs, but offers as an alternative that the Board order a representation vote. Counsel for the union wishes, if necessary, to call evidence on the issue of the proper date of the card.

Counsel for both the employer and the group of objecting employees have relied upon the decision of *Guelph Paper Box Company Limited* [1985] OLRB Rep. May 673 to support their position. In my view, a full reading of that decision supports the applicant's proposition. In that decision, 3 cards before the Board were defective and/or suffered from difficulties; two were incorrectly dated (one stale dated, one without a date but with the month and year) and one did not disclose the \$1.00 payment then required by the Act. These errors were *not* reflected by the Form 9 (as it then was) filed with the Board. Referring first to the card which did not disclose the \$1.00 payment, and, secondly, to the two improperly dated cards, the Board stated, as follows, at paragraph 2:

Having regard to the requirements of Rule 73 of the Board's Rules of Procedure, the defect was not one which could have been cured by oral evidence of payment: see P.R.C. Chemical Corporation of Canada Ltd., [1980] OLRB Rep. May 749. The problem with the other two cards concerned their dates. Difficulties with dates can be cured with oral evidence: Campbell Soup Company Limited, [1966] OLRB Rep. Mar. 883; P.R.C. Chemical Corporation of Canada Ltd., supra, at paras, 20-23.

Earlier, in *Maple Leaf Mills Limited* [1984] OLRB Rep. Oct. 1474, the Board, citing *P.R.C. Chemical Corporation of Canada Ltd.*, *supra*, observed the distinction between defects in documentary evidence which are "substantive" in nature, and those which are "merely formal or technical". It was expressly stated that the absence of information such as the date of the application for membership in a trade union is a "formal or technical" defect because it did not go to the substantive elements of proof of membership. The Board went on to note that it can entertain *viva voce* evidence in order to establish the date (in that case, on which payment of \$1.00 was made). I note that in *Maple Leaf Mills Limited* the defects were not disclosed in the Form 9 declaration and the Board did entertain evidence from the declarant and two collectors of the membership evidence. Likewise, in *Guelph Paper Box Company, supra*, the business agent of the applicant who received the two improperly dated cards testified as to the dates that ought to have been reflected on the cards filed with the Board.

In my view, the Form A-4 filed with the Board is not fatally flawed because it omits to note the improperly dated card. However, the error on the card means that, at this point at least, no weight can be given to the particular card. Should the applicant determine that it wishes to adduce *viva voce* testimony before the Board to cure the difficulty apparent from the face of the card, it should advise the Board (and counsel for the other parties) and a hearing date will be set to entertain such evidence.

Ultimately, testimony was adduced by the applicant which established that the membership application card was in fact executed on January 9, 1995.

(m) Status of Head Cashier

89. One of the outstanding issues between the parties was the "employee" status of the

Head Cashier; the applicant asserted that the Head Cashier, Ms. Diane Hodder, was an employee for the purposes of the Act and ought to be included on the list of employees. Both the employer and the group of objecting employees asserted that the Head Cashier was a managerial position, and ought to be excluded from collective bargaining pursuant to section 1(3) of the Act.

90. The Board heard the evidence of Ms. Elaine Oster, a computer operator for the employer. Prior to assuming her current position, Ms. Oster filled many roles, including that of Store Manager and Head Cashier. Ms. Oster testified regarding the duties and responsibilities of the Head Cashier position during her tenure, which ended on or about December 29, 1994 (at which time Ms. Hodder was promoted to the position). After hearing the testimony of Ms. Oster, the applicant advised the Board that it was prepared to acknowledge that, as at February 21, 1995, the certification application date, Ms. Hodder was not an "employee" for the purposes of the Labour Relations Act, and therefore that her name ought not to be included on the list of employees.

(n) Ms. Hodder's Involvement in the Applicant's Organizing Drive

- An issue related to the above issue is the effect of Ms. Hodder's involvement in the organizing drive relating to the employees of this store. There is no dispute amongst the parties that Ms. Hodder, the employer's Head Cashier, became involved in the organizing drive which for all intents and purposes commenced on January 9, 1995. There is, however, a divergence of views regarding the legal effect of that involvement. At the same juncture the Board entertained evidence and argument respecting an issue raised by the group of objecting employees, namely that there was some confusion created during the organizing drive because the entity that was organizing the employees was Local 175 and not the current applicant, the International. The group of objecting employees asserts that the International ought not to be able to bring this application as it was not the entity organizing the employees.
- 92. The Board heard the testimony of three witnesses regarding these issues. Mr. Tim Ryan and Mr. Bill Kalka testified on behalf of the applicant. Messrs. Ryan and Kalka were the two individuals who organized the employees of the employer during January, 1995. Neither was, at the time, a full-time organizer for either the International or Local 175, but both were acting in that capacity at all relevant times. The Board also heard the testimony of Ms. Hodder, who testified on behalf of the employer.
- Although many of the facts relating to these two issues are not in dispute, the parties do 93. not agree on the conclusions that ought to be drawn regarding particular events alleged in the pleadings. In this case, as in many others, it has been necessary for the Board to consider the credibility of the witnesses who testified. Each party to this proceeding urged the Board to accept the testimony of the witness or witnesses who testified on its behalf, and to reject the testimony of those who testified on behalf of the other parties. At times, the testimony of each witness was troublesome. Mr. Ryan, in the Board's view, testified to the best of his recollection but could not recall in sufficient detail many of the events in dispute. Mr. Kalka had a similar difficulty recalling details and often was clearly speculating as to what may well have occurred, rather than testifying as to what he could definitely recall. Furthermore, at times Mr. Kalka could not resist the tug of self-interest, initially denying, and then acknowledging, the most reasonable of propositions which were put to him in cross-examination. Just as troublesome was the testimony of Ms. Hodder. Ms. Hodder was, at times, inconsistent in her testimony and, in the view of the Board, did not, at times, testify in a frank manner. Where it is necessary to do so the Board will comment on the specific testimony of these witnesses.

- What follows are the factual findings that are made by the Board with respect to these two issues.
- On December 28, 1994, Ms. Hodder met with Mr. Vic Murai, then the owner of the franchise subject to this application, and Ms. Elaine Oster, the Store Manager and Head Cashier. During that meeting, Ms. Hodder was offered the position of Head Cashier, effective, for all intents and purposes, immediately. The offer was accepted by Ms. Hodder and she was provided with a letter dated December 29, 1994, confirming her acceptance of this position and outlining the duties and responsibilities inherent in the position of Head Cashier. The duties include the hiring, training and termination of cashiers, the enforcement of store policies and regulations, and the scheduling of hours for cashiers. Ms. Hodder would also be responsible, on occasion, to act in the role of "duty manager", in which role she would be responsible for the entire store. As noted above, it is agreed by the parties that by February 21, 1995, the certification application date, Ms. Hodder had exercised managerial functions to such a degree that she ought to be excluded from the bargaining unit. However, as will become evident shortly, what is pertinent for the purposes of this particular issue is the knowledge and perceptions of employees of the authority held by the Head Cashier as at January 10, 1995.
- 96. The Board is satisfied that shortly after Ms. Hodder's promotion to the position of Head Cashier all cashiers became aware of the appointment. There is no dispute that shortly after the appointment a notice was posted to the effect that Ms. Hodder had been awarded the position, and that a number of the cashiers reacted to the promotion (most congratulating Ms. Hodder, but one employee resigning). As this notice was posted on a bulletin board in a coffee room for employees, it would also seem reasonable to conclude that other employees became aware of the promotion soon after it was effected.
- Ms. Hodder testified as to the exercise of her duties up to January 10, 1995. Having regard to all of the evidence, the Board is satisfied that Ms. Hodder exercised many of the duties and responsibilities of the position of Head Cashier prior to January 10, 1995. These included scheduling cashiers, directing cashiers on a day-to-day basis, and disciplining cashiers when necessary. As Ms. Hodder had only been in the position for just over a week as at January 10, 1995, it is not surprising that she had not hired or fired individuals by that date. Nor had she acted in the role of duty manager by that date. However, there is no doubt that she did carry out, on a daily basis, many of the duties inherent in the job of Head Cashier prior to January 10, 1995. Just as importantly, if not more importantly, the Board is satisfied that it would not have been lost on the cashiers that Ms. Hodder was their immediate boss as at the time of her appointment, and that she would have the authority to hire, discipline and terminate the employment of cashiers, and to schedule their work. The letter of December 29, 1994 outlining the scope of Ms. Hodder's authority was not posted beside the announcement of Ms. Hodder's promotion. Nonetheless, Ms. Oster, the previous Head Cashier, definitely held that authority and although any particular exercise of that authority by Ms. Oster could have been made in the role of Store Manager rather than that of Head Cashier, the Board is satisfied, on balance, that the cashiers would have been under the belief that as Head Cashier Ms. Hodder had the power to direct and, if necessary, discipline them.
- 98. The significance of this becomes apparent once one considers the events of January 10, 1995. That evening, Mr. Kalka, Mr. Ryan and one Mr. Lyle Smith, all acting on behalf of Local 175, met with approximately 18 to 20 employees of the then employer, Murai Holdings. Ms. Hodder, who had been invited to this meeting by Mr. Greg Logue, an employee, drove herself and four other employees to the Red Dog Inn to meet with Mr. Kalka. Shortly after her arrival, she raised with Mr. Kalka a concern she had regarding her attendance at the meeting. It is unclear from the evidence how many of those present heard the discussion between Ms. Hodder and Mr.

- Kalka. Ms. Hodder's testimony ranged from stating that "everyone" heard her to the statement that *some* of the people *could* have heard her. In any event, Mr. Kalka, after briefly speaking with Ms. Hodder, and contacting his Regional Director, Mr. Onichuk, satisfied himself that Ms. Hodder could remain at the meeting and sign a membership card if she so desired. Accordingly, Ms. Hodder remained in the room.
- Subsequently, Mr. Kalka spoke to the employees present and asked them to sign membership cards which were distributed. The Board is satisfied that during his presentation to those present Mr. Kalka indicated that Local 175 is a trade union which is affiliated with the International. Ms. Hodder immediately read the card given to her, completed it (noting on the face of the card that she was a "cashier"), and signed it. Later in the meeting she confirmed to Mr. Kalka that she had signed the card. Certain other employees signed membership cards at that time, including one cashier who works under the direction of Ms. Hodder. There is no doubt that Ms. Hodder was in the position to view other individuals executing their membership cards, and that other employees would have been aware of Ms. Hodder's presence in the room.
- Prior to Ms. Hodder's testimony, the Board determined that the membership application card relied upon by the applicant was both a Local membership card and an International membership card. During her testimony, Ms. Hodder stated that the card she signed referred only to Local 175 in the body of the card, and that, had she known that she was executing a membership card in favour of both the Local and the International, she would have raised some questions about the consequences of doing so, in particular the possibility of paying double dues, and concerns about dues money being sent to the United States. The Board rejects this testimony in its entirety. In the view of the Board, Ms. Hodder did not testify in a frank or honest manner when describing her "concerns" about becoming a member of the International. After testifying that she had read her card thoroughly before signing it, and that she was certain that it only made reference to Local 175, her card was put before her and, as noted above (in paragraph 77), it became quite apparent that the body of the card refers to the International. During re-examination, Ms. Hodder revised her testimony to say that she had only "browsed" over the card, rather than having read it. Quite simply, Ms. Hodder was not credible on this point. She acknowledged having been a member of Local 175 previously while employed in Kenora, Ontario, and also acknowledged that she went to the meeting and signed a card primarily to force Mr. Murai, whom she disliked, out of the business. In the view of the Board, on January 10, 1995 Ms. Hodder was quite willing to join either or both the International or Local 175, and at no time had a concern about "double dues" or the possible flight of dues money to the United States.
- After the employees at the meeting of January 10, 1995 had signed membership cards, a fellow employee came up to Ms. Hodder and indicated that an insufficient number of applications for membership had been signed. Ms. Hodder was asked by this employee to call some cashiers not then present in order to obtain more applications for membership. Using the phone in the room, Ms. Hodder called a part-time cashier and asked her to attend at the hotel room to sign a card because "we needed her". Ultimately, that cashier did so and advised Ms. Hodder the next day that she had signed a card. On that same day, Ms. Hodder called a second part-time cashier from work, told her that an insufficient number of people had signed cards, and told her to "get her butt down" to the hotel room to sign a card in favour of the union. Again, that employee did so on the way into work and advised Ms. Hodder the same day that she had executed a card as requested.
- On these facts, the Board must determine what result is appropriate. In a nutshell, Mr. Tarasuk asserts that the facts establish a violation of section 13 of the Act, and requests that the application be dismissed. Alternatively, Mr. Tarasuk states that, at the very least, the Board can-

not be satisfied that the membership application cards represent the true wishes of the employees because of the potential influence that Ms. Hodder would have had on the willingness of those present at the meeting, and those whom she called, to execute membership cards. In such a case, Mr. Tarasuk urges the Board to direct the taking of a representation vote pursuant to section 8(3) of the Act. Mr. Abbass, on behalf of the group of objecting employees, focused his argument primarily on the issue of "confusion" and asserted that Local 175 was the organizer, and that it is inappropriate to permit the International to apply for certification because the employees would have been under the impression that Local 175 was the entity it had authorized to apply for certification. Authorities cited by Mr. Tarasuk and Mr. Abbass in support of their positions are *Shaw Industries Ltd.*, [1993] OLRB Rep. Aug. 798; *Ontario Hydro*, [1989] OLRB Rep. Feb. 185; *Addidas Textile (Canada) Ltd.*, [1980] OLRB Rep. May 639; *Elk Lake Planing Mill Limited*, [1981] OLRB Rep. Apr. 446; *Waldorf-Astonia Hotel*, [1981] OLRB Rep. Sept. 1308; and *IATSE*, [1995] OLRB Rep. July 954.

Mr. Stout argues, on behalf of the applicant, that section 13 of the Act has not been violated, focusing on Ms. Hodder's admission that she participated in this organizing drive on her own accord, contrary to the wishes of Mr. Murai. In such circumstances, the purpose underlying section 13 of the Act is not satisfied by dismissing the application. With regard to the potential influence of Ms. Hodder on those who signed membership applications, Mr. Stout focuses on the testimony of Ms. Hodder who stated that she considered these cashiers friends and never overtly threatened anyone. Further, Mr. Stout argues that the organising drive was employee-driven and therefore the Board can be more comfortable regarding the voluntariness of the cards submitted. Furthermore, counsel submitted that the cashiers asked by Ms. Hodder to sign applications for membership themselves had some potential information to provide Mr. Murai (i.e. that Ms. Hodder was a union supporter) and that holding such information would lead them to believe that Ms. Hodder would not retaliate against them in any way. As well, Mr. Stout asserted that Ms. Hodder was not the collector of the cards and submitted that in those circumstances her influence was negligible. Ultimately, Mr. Stout asserted that there was no clear or cogent evidence that anyone was intimidated or coerced into signing a membership application. With regard to Mr. Abbass' arguments relating to confusion, Mr. Stout asserted that the evidence established that both Local 175 and the International was identified by Mr. Kalka, and that as a matter of law the International can utilize a local union affiliate's membership application in any event. Authorities cited by Mr. Stout were Consumers Distributing, [1995] OLRB Rep. Mar. 250; Ontario Hydro, supra; Menkes Developments Inc., [1981] OLRB Rep. Sept. 1290; Children's Aid Society of Metropolitan Toronto, [1976] OLRB Rep. Nov. 651; Japanco Company Limited, [1979] OLRB Rep. Feb. 106; Davis Distributing Ltd., [1994] OLRB Rep. Sept. 1190; Bond Structural Steel (1965) Ltd., [1979] OLRB Rep. Dec. 1137; and Versa Services Ltd., [1995] OLRB Rep. Jan. 79.

104. The argument that the conduct of Ms. Hodder establishes a breach of section 13 of the Act cannot be sustained. Section 13 of the Act provides, in part, as follows:

The Board shall not certify a trade union if any employer or any employer's organization has participated in its formation or administration or has contributed financial or other support to it

The Board was referred to a number of decisions respecting the scope of section 13 of the Act, and its predecessors. In *Ontario Hydro*, [1989] OLRB Rep. Feb. 185, the Board made the following observations regarding the involvement of persons who exercise managerial functions in a trade union's organizing campaign:

75. The Board has on several occasions addressed the proposition that involvement in a trade union's affairs or organizing campaign by persons who exercise managerial functions within the

meaning of subsection 1(3)(b) amounts to employer support within the meaning of section 13. Some older decisions suggested that it did: Federal Packaging and Partition Company Limited, [1972] OLRB Rep. Apr. 316; Kelly Funeral Homes Limited, [1973] OLRB Rep. Feb. 87; Leamington District Memorial Hospital, [1973] OLRB Rep. June 376. Later decisions, however, rejected the automatic application of section 13 in these circumstances, as the Board noted in Addidas Textile (Canada) Ltd., [1980] OLRB Rep. May 639, where (at paragraph 6) it said this about what is now section 13:

The purpose of this section, in keeping with the scheme of the Act, is to maintain the necessary arm's length relationship between employees on the one hand, and trade unions, as representatives of employees, on the other. In applying section 12[now 13], the Board has drawn a distinction between support tendered by the employer, either directly or through persons holding managerial positions within his organization, and support tendered by persons who occupy management positions within his organization, and support tendered by persons who occupy management positions but act on their initiative against the employer's interest in support of the interests of the employees. Although a question may arise in these latter circumstances as to the voluntariness of the membership evidence, the necessary arm's length relationship between employer and trade union may not be undermined in a manner which requires the automatic application of the section 12 bar. In rejecting the automatic application of section 12 in these circumstances (as in the Learnington Hospital case, [1973] OLRB Rep. June 376) the Board stated at para. 14 of the

Hospital case, [1973] OLRB Rep. June 376) the Board stated at para. 14 of the Children's Aid Society case, supra:

"... The Board recognizes that in the modern organizational setting interests of individual persons deemed to be managerial are not necessarily coincidental with those of the employer. If the evidence establishes that such persons acted on behalf or in the interests of the employer then undoubtedly the section 12 bar would apply. If, however, the evidence establishes that the persons were acting not on behalf of the employer but contrary to the wishes and interests of the employer (see *Air Liquide* case (1964) CLLC 16,002) then it cannot be said that the employer has participated contrary to section 12, or section 56 for that matter. Similarly if the evidence establishes that the disputed persons have been acting in their self interest rather than on behalf of or in the interest of the employer, then again section 12 should not be activated."

(See also Edwards and Edwards Ltd. 52 CLLC ¶17,027, Municipality of Casimir, Jennings and Appleby, supra, Japamco Company Limited, supra and York Steel Construction Limited, decision dated January 24, 1980, unreported, Board File No. 1501-79-R.) The purpose of the section is to prevent the certification of a trade union which is party to a "sweetheart deal" with an employer or is the recipient of employer support so that it does not owe its sole allegience [sic] to those whom it is certified to represent. The Board has consistently applied the section having regard to its underlying purpose.

Applying the principles set out in *Ontario Hydro*, *supra*, and the cases cited therein, no violation of section 13 of the Act has been established. Persons such as Ms. Hodder, who hold a managerial position, and act on their own initiative against the employer's interest, such as in this case, do not in any way undermine the "necessary arm's length relationship" between the employer and the trade union which is required by the Act. It cannot be disputed that both the International and Local 175 are trade unions with arm's length relationships from the employer in this proceeding, and Murai Holdings in the prior Board file. Accordingly, this argument must be dismissed.

105. However, as noted in the excerpt from Addidas Textile (Canada) Ltd., [1980] OLRB Rep. May 639, quoted in Ontario Hydro, supra, the involvement of an individual who exercises managerial functions in the trade union's organizing campaign may raise a question regarding the voluntariness of the membership evidence. Such a question is raised in this case. The majority of membership application cards filed in support of this application were signed by employees in the presence of a manager excluded from bargaining pursuant to section 1(3) of the Act. One of those

employees was a cashier who reported to Ms. Hodder. Other membership application cards were obtained as a direct result of Ms. Hodder's personal request to two other cashiers who reported to her. Although it is apparent that the organizers did not intend for a person exercising managerial functions to remain at the initial meeting of employees (or perhaps to become involved in the recruitment of members), the fact is that a manager was present and visible at that meeting, was one of the first to execute a membership application, was in a position to view other employees who executed membership applications subsequent to her, and contacted cashiers who reported to her and asked them to sign membership applications.

106. Section 8(3) of the *Labour Relations Act* provides as follows:

(3) The Board may direct that a representation vote be taken if it is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union on the certification application date or have applied to become members on or before that date.

As was observed by the Board in *Shaw Industries Ltd.*, [1993] OLRB Rep. Aug. 798, at paragraphs 22 to 26, the scheme of the *Labour Relations Act* (prior to the advent of the *Labour Relations Act*, 1995 in November, 1995) recognizes documentary evidence of membership or application for membership in a trade union as the primary basis upon which a certificate will issue. Upon satisfying the Board through the vehicle of the membership card or an application for membership that it represented more than 55% of the employees in an appropriate bargaining unit, a trade union would in the normal course be provided a certificate entitling it to represent, for employment purposes, all of the employees of an employer in that bargaining unit. The utilization of a confirmatory representation vote is a residual mechanism to be resorted to only in exceptional circumstances. In *Shaw Industries Ltd.*, *supra*, the Board (at paragraph 28) described certain situations where such a confirmatory representation vote may be appropriate:

Over time, the Board has developed a non-exhaustive list of what may be "compelling reasons" to order a vote in the circumstances where the union has otherwise filed evidence of sufficient membership support. A vote may be required where one of the following intervening factors arises and call the evidence into question: . . .unreliable membership evidence (*Gruyich Services, supra*) . . .

- At the outset, it is appropriate to consider the reliability of the membership applications signed by the three cashiers who report to Ms. Hodder. Ms. Hodder's attendance at the meeting of employees, in which she sat within inches of a cashier reporting to her, and her subsequent involvement in contacting two of her direct reports to sign membership application cards, raises legitimate questions respecting whether the cards of any of those three employees reflects the voluntary wishes of those individuals. During argument counsel for the applicant noted that Ms. Hodder conceded during testimony that she had not coerced anyone into signing membership cards. He also asserted that the potential consequences to Ms. Hodder of participating in the organizing campaign would be a significant inducement to her to ensure that no one who chose to not join the union was negatively affected. These consequences would, he asserted, be anticipated by employees who would be willing to reject the union confident that in doing so they were not putting their employment (or their current terms of employment) at risk.
- Neither of these observations cures the fundamental flaw represented by Ms. Hodder's involvement in the organizing campaign. Ms. Hodder's good faith and lack of intent to intimidate, coerce or influence the signing of membership application cards is not the issue. What is the issue is the reasonable perception of employees who are directly managed by Ms. Hodder, and in particular whether they may have felt an obligation to support the manager's desire to unionize in order to ensure that their employment, or terms of employment, were not negatively affected. The Board cannot be satisfied, in the circumstances described above, that such an obligation was not felt by

the three cashiers who signed membership applications on January 10 and 11, 1995. The "balance of consequences" scenario relied upon by counsel during argument seems to the Board to be somewhat artificial and unrealistic. It is unlikely that a part-time employee whose hours of work depend on Ms. Hodder's scheduling authority would consider as a lever the fact that he or she could advise Mr. Murai that Ms. Hodder had participated in the organization of a union, as it could raise concerns regarding that employee's involvement as well. And as Mr. Murai may not properly discipline Ms. Hodder for her involvement, the cashiers would be left in the position of having to work under Ms. Hodder who would know that one or more of them had disclosed her participation in the union.

- None of Mr. Stout's other arguments satisfy the Board that these three membership cards were not signed in the shadow of Ms. Hodder's influence. The evidence before the Board does not establish that the organizing drive was "employee driven". In fact it establishes only that one employee contacted the offices of Local 175 regarding unionization. Furthermore, although Ms. Hodder did not collect the membership applications of the two cashiers whom she telephoned, she clearly induced the two to sign the cards, and it is significant that both, after signing, confirmed to Ms. Hodder their having done so. In all the circumstances, the Board is not satisfied of the voluntariness of the three cards signed by the cashiers.
- Argument was heard respecting the effect of Ms. Hodder's presence at the meeting on other cards signed that night. It is necessary to address that issue as the membership evidence filed by the applicant, excluding the three membership applications referred to above, establishes support of 55.8% of the individuals in the bargaining unit. In this regard, the Board has accepted as valid the one card which was improperly dated. The evidence called by the applicant established quite clearly that the card was executed on January 9, 1995.
- Having considered the evidence and the submissions of the parties, I am convinced that the membership evidence signed by employees other than the three cashiers ought to be given full weight. It is true that Ms. Hodder was present in the room when most of the employees who signed membership application cards did so. It is also true that at that time she would eventually be assigned (on a rotating basis) the role of "duty manager", responsible for the operation of the store in the absence of the owner or store manager. Accordingly, there is potentially some merit to the argument that one or more of those in the room on January 10, 1995 may have felt compelled to sign applications for membership because of Ms. Hodder's presence.
- On balance, though, I am satisfied that, considered objectively, such a conclusion cannot be reached on the facts of this case. Ms. Hodder had not exercised any responsibilities as duty manager prior to January 10, 1995. There is, as well, no evidence to suggest that the employees of the store were aware on January 10, 1996 that Ms. Hodder would be assigned duty manager tasks in the future. Ms. Oster agreed when testifying that nothing was given to employees outlining the duties of the head cashier. The duty manager tasks are not included in Ms. Hodder's job description which was filed with the Board as an exhibit. Ms. Hodder testified that she understood her job to be defined as contained in the job description, as that it reflected the discussion that she initially had with Ms. Oster and Mr. Murai. In that regard, Ms. Oster confirmed that she told Ms. Hodder that the Head Cashier's position consisted of the tasks contained in her job description. Ms. Hodder also conceded in cross-examination that an employee who was not a cashier would have no reason to think that she was his or her boss because of the duty manager role which was occasionally performed by her. Ms. Oster confirmed that the department managers, when acting as "duty manager", would be expected to "handle problems" at the time they arise, but qualified her testimony. noting that managers are expected to handle their own staff and that duty managers had the "option" to refer the situation to the department manager in question. Finally, Ms. Oster conceded

that she could not recall disciplining anyone beyond her own department while acting in the role of duty manager.

- In all of these circumstances, I am satisfied that the employees in attendance at the meeting of January 10, 1995 who were not cashiers would not have been influenced by Ms. Hodder's presence into signing a membership application card. The employees could have had no legitimate fear of retribution from Ms. Hodder for refusing to do so.
- 114. Accordingly, except as otherwise noted above, I am unwilling to conclude that the membership evidence before me is unreliable, and it is not necessary to order a representation vote pursuant to section 8(3) of the Act.
- With respect to the issue of "confusion", argued primarily by Mr. Abbass, that argument cannot succeed. As noted above, I am satisfied that the membership application form utilized in this proceeding is a card which is dual in nature, in which the applicant requests membership in both Local 175 and the International. On the evidence before me, it is apparent that the campaign was carried out by individuals representing Local 175, but that the relationship between Local 175 and the International was made clear to those in attendance. Most importantly, I reject the evidence of Ms. Hodder respecting the "concerns" she alleges she now has regarding the consequences of signing a membership application for both Local 175 and the International. Ms. Hodder's testimony was unpersuasive. There is absolutely no credible evidence before me that anyone was confused or could have been confused by the organizing drive. Accordingly, I reject this argument.

III. The Conduct of Counsel During These Proceedings

- 116. It is a trite observation that certain litigation can bring out the worst in legal counsel. This was one such matter in which the behaviour of counsel was so disruptive to the proper conduct of the hearing that the Board feels compelled to make several comments regarding the behaviour of counsel. During the first week of hearings in these proceedings counsel for the applicants was Mr. Kucey. Appearing for the employer and for the group of objecting employees were, respectively, Mr. Tarasuk and Mr. Abbass. After the first week of hearings, Mr. Stout acted for the applicant in the certification application. It should be stressed here that none of the comments which follow are directed towards Mr. Stout, who represented his client before the Board in an entirely professional manner throughout the course of his participation in this proceeding.
- Mr. Tarasuk and Mr. Abbass were, on numerous occasions, rude, interruptive, and disrespectful of other counsel appearing at the hearing, of me, as the Vice-Chair of the Board assigned to hear this matter, and of the Ontario Labour Relations Board, as an institution. Mr. Abbass, in particular, seemed to take pleasure in continually disrupting the course of this proceeding. Both Mr. Abbass and Mr. Tarasuk appear to hold the view that each has the unqualified right to interject personal opinions or snide commentary at will during opposing counsel's argument. On innumerable occasions I directed each of Mr. Abbass and Mr. Tarasuk to refrain from such conduct. Each was advised that he would have an opportunity, at the appropriate time, to respond to opposing counsel's argument. However, my directions were regularly ignored or challenged by counsel and more often than not caused Mr. Abbass and Mr. Tarasuk to more vigorously interject, resulting, on occasion, in the need for me to raise my voice above theirs in order to maintain some semblance of order in the hearing room.
- At the end of the first week of hearing, in the presence of Mr. Tarasuk and Mr. Kucey, but not Mr. Abbass (who had left the hearing room early with the permission of the Board), I advised counsel in the most certain of terms that the conduct exhibited by them during that week

was entirely inappropriate and would not be tolerated any further. As noted above, it was at this point that Mr. Kucey was replaced as counsel for the union by Mr. Stout, who acted professionally throughout the remainder of the hearing. It was, however, unfortunate that Mr. Abbass was absent, for, although I repeated my comments for his benefit at the start of the next hearing date, Mr. Abbass' inappropriate conduct continued throughout the remainder of the hearing dates.

- As noted above, Mr. Abbass was, throughout this proceeding, rude, interruptive, and disrespectful towards both me as the adjudicator in this case, and of the Ontario Labour Relations Board itself, as an institution. On one occasion, for example, Mr. Abbass was asked by me to provide full copies of case authorities rather than selected pages of the decisions, which had been his practice to that date. In the most certain of terms Mr. Abbass informed me that he would not do so, and that if I wished to read the entire case I could go to the Board's library to do so. Ultimately, in order to ensure that copies of case authorities were provided in their entirety, it was necessary to issue a written decision dated May 12, 1995 directing Mr. Abbass to provide full copies of his case authorities.
- 120. On a further occasion, Mr. Abbass was directed to cease making interjections during the submissions of opposing counsel; his comments were quite audible and clearly inappropriate. Shortly after being directed to refrain from making such comments, Mr. Abbass, without having said anything audible, once again interrupted Mr. Kucey's argument to advise all present of something that he asserted he had just then said under his breath. This further interruption, he stated, was necessary to ensure that I did not think that he was saying anything under his breath. His interjection led to a somewhat sharp discussion regarding the questionable utility of making such interruptions.
- 121. On a later hearing date, during Mr. Stout's submissions on a procedural objection, Mr. Abbass interrupted him (for the purpose of making his own observations) on four separate occasions, notwithstanding that he had been directed to refrain from doing so after each earlier occasion. When I asked Mr. Abbass why he continued to interrupt Mr. Stout, in contravention of my directions to the contrary, he stated, on one occasion, that if I had more "experience", I would be aware that such interruptions are commonplace during hearings of the Board. Mr. Abbass then stated that if I did not want to hear his interjections, then that was "tough". On a later occasion on that same hearing date, he asserted that he would not abide by my directions to cease the interruptions of other counsel because my directions were "improper". No basis for the impropriety of my directions was asserted by Mr. Abbass.
- Near the conclusion of evidence, on two separate occasions, Mr. Stout objected to Mr. Abbass' cross-examination of a witness on the grounds of relevance. On each occasion I asked Mr. Abbass to explain the relevance of his questions. On the first occasion, Mr. Abbass stated that he did not have to explain his theory of the relevance of the question to me. On the other occasion, I asked Mr. Abbass to explain the relevance of his question at least three times. Mr. Abbass' response, each time, was to say, in an insolent manner, "you tell me". He ended his submissions by stating that he had thought that I would help him because I helped applicant's counsel. Mr. Abbass' assertion that I helped Mr. Stout is entirely without substance. Ultimately, I ruled the questions to be entirely irrelevant to the issues in dispute.
- On no less than thirty separate occasions during the course of this hearing Mr. Abbass asserted or implied that I had "closed my mind" to his submissions, or that I was "biased" towards him. These allegations ranged from repeated snide remarks regarding the need to keep an "open mind" to his arguments, to blunt statements that I was biased. In fact, the suggestion of bias was made by Mr. Abbass so often that it is evident that he does not fully appreciate the gravity or sig-

nificance of making such an allegation, or was making the assertions in an unsuccessful attempt to intimidate the Board. The following examples reflect the general tenor of Mr. Abbass' assertions that I was biased. During the course of argument on one particular motion I asked Mr. Abbass a question regarding the substance of his submissions. Mr. Abbass asserted that by merely asking him questions I had showed that I had closed my mind to his argument. Mr. Abbass asserted that a quasi-judicial tribunal which was not investigatory in nature ought not to ask him any questions respecting his argument. Later during the proceeding, when I indicated to counsel that I had previously read the decision of the Board in *Bannerman Enterprises Inc.*, [1994] OLRB Rep. Nov. 1489, in which a similar argument to that then being argued had been made (and rejected), Mr. Abbass asserted that by merely reading the case I had closed my mind to his argument. At least once during the case Mr. Abbass asserted that my delivering a "bottom line" decision on a pending motion, with reasons to follow, gave weight to his earlier claims that I was biased against his argument.

- In my view, the assertions of bias made by Mr. Abbass were groundless and made for the purpose of disrupting the hearing and intimidating the Board. On at least four separate occasions during this proceeding Mr. Abbass was invited by me to bring a motion to have me removed from hearing these matters, if he was of the view that I had, through my conduct, demonstrated a reasonable apprehension of bias towards his client. In fact, a specific date was set to hear Mr. Abbass' argument respecting my "appearance of bias" alleged in his correspondence dated May 3, 1995. Shortly before the hearing Mr. Abbass advised the Board that he would not formally pursue the allegations. On none of these occasions did Mr. Abbass accept the invitation to bring such a motion; on each occasion Mr. Abbass specifically declined to bring such a motion. During the course of the hearing, Mr. Abbass was directed more than once to either bring such a motion or to refrain from making comments to the effect that the Board had demonstrated a reasonable apprehension of bias for the remainder of the hearing. Mr. Abbass continued to make these assertions of bias throughout the hearing, notwithstanding the Board's directions.
- Mr. Tarasuk's conduct at times rivalled that of Mr. Abbass. On more than one occasion, Mr. Tarasuk demanded that the proceedings be adjourned in order for reasons for a "bottom line" decision to be delivered. Upon my rejection of that request, Mr. Tarasuk would rudely reinstitute the "request", clearly giving no weight to the ruling previously made. While Mr. Kucey was in attendance, Mr. Tarasuk insisted on numerous occasions that he had the right to comment immediately upon any critical observations made by Mr. Kucey. When I advised Mr. Tarasuk on numerous occasions that the observations of Mr. Kucey were of no particular relevance to the issues at hand, and therefore unnecessary to respond to, Mr. Tarasuk would not accept that assessment and would demand to immediately rebut the observation made. On one such occasion, Mr. Tarasuk asserted a denial of the right to make submissions and, upon being provided an opportunity to make his argument, promptly and inexplicably refused to do so.
- Notwithstanding that Mr. Tarasuk was present during my admonition during the first week of the hearing, his conduct did not significantly change during the course of the hearing. Close to the completion of the evidence, and during Mr. Tarasuk's questioning of one of Mr. Stout's witnesses, Mr. Stout unsuccessfully objected to a question partially asked by Mr. Tarasuk. At that time I advised Mr. Stout to wait until the question had been fully asked before objecting. Mr. Abbass, characteristically, interjected a comment to the effect that Mr. Stout was objecting too often. I noted that Mr. Abbass had earlier made such an objection during his cross-examination of the witness, and that I had earlier noted that Mr. Stout's high success rate on his objections suggested that the objections were hardly unreasonable or intended to disrupt the hearing. This observation caused Mr. Tarasuk to explode into a tirade, accusing me of "tarring" him with Mr. Abbass' "record", and having "made up [my] mind" on the objection. It is difficult to explain this reaction by Mr. Tarasuk, particularly since it was not Mr. Tarasuk who complained about the rate

- of Mr. Stout's objections in the first place, and since I had denied the objection of Mr. Stout. This type of explosive response by Mr. Tarasuk was an oft-repeated event during the course of the hearing.
- Many of Mr. Abbass' and Mr. Tarasuk's complaints focused on what was stated by them to be my favouritism towards Mr. Kucey and Mr. Stout during the hearing. It was asserted on numerous occasions that I treated Mr. Kucey better than I had treated either of them. That was, in fact, not the case. Quite simply, although Mr. Kucey on occasion felt it necessary to make comments of an inappropriate nature directed towards opposing counsel, his comments were numerically rare in comparison to the frequency of the inappropriate comments made by Mr. Abbass and Mr. Tarasuk. Although Mr. Kucey was directed to cease making such comments, it would not be difficult for Mr. Abbass or Mr. Tarasuk to perceive that they were being singled out in light of the large number of times that I was required to direct each of them to cease making their offensive comments. In light of the fact that it was the inappropriate conduct of Mr. Abbass (and, to a lesser extent, Mr. Tarasuk) that resulted in my repeated directions to cease such conduct, it can hardly lie in their mouths to assert "bias" as a result of good faith attempts to keep the proceedings on track.
- 128. The type of conduct exhibited by Mr. Abbass and Mr. Tarasuk during the course of this proceeding is unacceptable before the Board. Their conduct seriously distracted from the legitimate issues before the Board, serving to prolong the hearing grossly beyond what was reasonable in the circumstances, and certainly resulted in needless expense to the taxpayers of this Province and their own clients. Worse yet, their conduct may well have negative long-term consequences to the parties which are now embarking on a new relationship.
- On occasion, the Board has written decisions in which the conduct of a party has been criticized (see, for example, *Bemar Construction (Ontario) Inc.*, [1992] OLRB Rep. May 565); however, such cases typically involve unrepresented parties and have not focused on the conduct of senior members of the bar of Ontario, who are presumed to be aware of the proper behaviour before the Board in litigation of this nature. In particular, it is my view that Mr. Abbass' conduct was intended by him to be disrespectful of the Board. On the last day of the hearing, Mr. Abbass made a somewhat lame attempt to justify his conduct as being the result of his "frustration" with certain aspects of Mr. Stout's argument. Such a justification for his conduct is just not available on the facts of this case. It is not necessary to speculate why Mr. Abbass conducted himself in the manner that he did, because there is simply no excuse for his behaviour. It suffices to say that whatever the cause, be it opposing counsel's argument or Mr. Abbass' belief in the significance of his self-described "experience" at the Board, his frustrations or difficulties should be dealt with beyond the hearing rooms of the Board and ought not to manifest themselves in the manner that they did during the course of this proceeding.
- 130. During the course of this hearing the Law Society of Upper Canada published in the September, 1995 edition of "The Advisor" (delivered to all members of the bar of Ontario) the following note under the heading "Courtesy, respect should guide conduct of lawyers before tribunals":

The Law Society, from time to time, receives complaints about lawyers from judges and members of administrative tribunals and boards.

Members of the profession are reminded of their obligation to treat both courts and tribunals with respect and courtesy. This includes, but is not limited to, behaviour relating to lateness, lack of preparation, non-attendance and double-booking.

The Professional Conduct Committee notes that most administrative tribunals lack the extensive

power of the courts, such as the power to make findings of contempt, to deal with these situations when they occur.

However, flagrant breaches of the duties of courtesy and respect by members appearing before or having dealings with such bodies could, upon investigation, result in disciplinary action.

Neither Mr. Abbass nor Mr. Tarasuk treated this tribunal with the requisite degree of courtesy and respect expected of lawyers in this province. In light of the contentious nature of the proceedings typically before the Board, a certain level of vigour is not unexpected from legal counsel that appear. During these proceedings, the conduct of Mr. Abbass and Mr. Tarasuk went well beyond the duty owed to their clients to raise any arguments available, and to represent their interests with vigour.

- During the course of arguing one of the many issues raised for determination, Mr. Abbass asserted that there could be no question that the Board has the power and responsibility to ensure that those who attend before it respect the proceedings of the Board. He is quite correct. The Board does have certain avenues available to it to control conduct of the nature described herein, including the referral of the incident or incidents to the Law Society of Upper Canada and/or a stated case of contempt to Divisional Court (see section 13 of the *Statutory Powers Procedure Act*). It is evident from my comments that I am extremely troubled by the conduct of both Mr. Abbass and Mr. Tarasuk during the course of these proceedings. Their conduct may well have been a violation of one or more of the Rules of Professional Conduct which govern members of the Law Society of Upper Canada. In addition, their conduct may well constitute contempt of this Board.
- In all of the circumstances, it is my view that Mr. Abbass and Mr. Tarasuk ought to attend before the Board to show cause why the Board ought not to state a case of contempt to Divisional Court or report their conduct to the Law Society of Upper Canada. Once the Board has had an opportunity to hear the evidence and submissions on behalf of Mr. Abbass and Mr. Tarasuk, it will be in a position to determine what action ought to be taken. Counsel should be prepared to address the possibility that the Board could state a case to Divisional Court of either civil or criminal contempt. In light of the nature of the inquiry, counsel should consider whether they ought to be represented by counsel at the hearing.
- 133. Mr. Abbass and Mr. Tarasuk should attend at the hearing with any evidence, documentary or otherwise, which may help to explain their conduct. Each will be provided an opportunity to call any relevant evidence and to make any submissions to the Board.
- This is, without a doubt, an extraordinary and unprecedented action of the Board. I have not reached the conclusion that this is the appropriate response without a great degree of reflection. However, the conduct of Mr. Abbass and Mr. Tarasuk was intentionally disrespectful of the Board. In such circumstances, counsel must appreciate that their conduct has consequences.

IV. Disposition

In accordance with the determinations made above, a certificate will issue to the applicant as bargaining agent for the employees in the following bargaining unit:

All employees of Robert M. Heenan Sales Ltd., in the Town of Fort Frances, save and except Head Cashier and persons above the rank of Head Cashier, office and clerical staff.

Mr. Cyril J. Abbass and Mr. Arthur P. Tarasuk are directed to attend before the Board to show cause why the Board ought not to state a case of contempt to Divisional Court or report

their conduct to the Law Society of Upper Canada. The Registrar is directed to schedule one or more hearing dates before this panel of the Board for the show cause hearing. A Notice of Hearing is to be forwarded to the parties to these proceedings to advise them of the date, time, and place of the hearing.

137. I am seized of these proceedings.

4106-94-R United Food & Commercial Workers International Union, Applicant v. **Robert M. Heenan Sales Ltd.,** Responding Party v. Group of Employees, Objectors

Certification - Contempt - Practice and Procedure - Board, in earlier decision, critical of conduct of objecting employees' counsel and employer's counsel - Counsel, in earlier decision, directed to attend before Board to show cause why Board ought not to state case of contempt to Divisional Court or report counsels' conduct to Law Society of Upper Canada - Counsel submitting letters of apology prior to show cause hearing - Board accepting counsels' apologies but not explanations or justifications offered for their conduct - Board concluding that show cause hearing unnecessary - Proceeding terminated

BEFORE: Lee Shouldice, Vice-Chair.

DECISION OF THE BOARD; May 8, 1996.

- 1. This is an application for certification. By way of decision dated February 20, 1996, the applicant was certified to represent a bargaining unit composed of all employees of the responding party, save and except Head Cashier and persons above the rank of Head Cashier, office and clerical staff.
- 2. The earlier decision of the Board directed that counsel for both the responding party and the group of objecting employees attend before the Board to show cause why I ought not state a case of contempt to Divisional Court or report their conduct to the Law Society of Upper Canada. In that regard, the Registrar was directed to schedule one or more hearing dates for evidence and submissions.
- 3. Prior to the scheduling of dates for the show cause hearing, both counsel wrote to the Registrar of the Board, enclosing a two-page letter addressed directly to this Vice-Chair of the Board. I have now reviewed those letters. Each counsel apologizes to the Board, and to this Vice-Chair, for his behaviour during the course of the hearing.
- 4. I am willing to accept the apologies offered by both counsel, although I do not accept the various explanations or justifications for their conduct which are made by counsel. In the circumstances, however, I am satisfied that it is now unnecessary to convene a show cause hearing, and accordingly this proceeding is terminated.

1933-94-U Dr. James Winter, Applicant v. The Faculty Association of the University of Windsor, Responding Party v. The University of Windsor, Intervenor

Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Applicant claiming that faculty union violated duty of fair representation when it refused to take his grievance to arbitration - Union's non-suit motion allowed - Application dismissed

BEFORE: Gail Misra, Vice-Chair.

APPEARANCES: Dr. James Winter for the applicant; James A. Renaud and Bruce Tucker for the responding party; Theodore Crljencia and Charles James for the intervenor.

DECISION OF THE BOARD; February 23, 1996

- 1. This is an application filed pursuant to section 96 (formerly section 91) of the *Labour Relations Act*, 1995, alleging a breach of section 74 (formerly section 69) of the Act.
- 2. The applicant ("Winter") is claiming that the responding party (the "Faculty Association" or the "Association") breached its duty of fair representation when it refused to take his grievance to arbitration. The University of Windsor (the "University"), the employer in this case, has intervened. As remedies the applicant has requested that the Board refer his grievance to arbitration; that he be permitted to use counsel of his choice at the arbitration, but at the Faculty Association's expense; and, that the Association be required to sign and distribute notices acknowledging its violation of the Act.
- 3. Given the complexity of the allegations, it took 14 days to hear the applicant's case. The intervenor then made a motion to non-suit the applicant as it was argued that the applicant had not made out a case for the relief he was seeking. The parties' arguments, made over the course of three days, will be outlined below.
- 4. At the hearing the applicant was not represented by counsel. At the outset, I explained to Dr. Winter that although persons involved in proceedings before the Board are entitled to appear before it without counsel or other representation, they do so at their own risk. It was explained to the applicant that the Board, as an adjudicative body, was unable to guide him in determining what evidence he should call to support his case, and that he would be responsible for the calling of evidence and the making of submissions to the Board. The Board is sensitive to the difficulties faced by persons who appear before it without representation. Consequently, I explained to Dr. Winter the general order of proceeding, that the applicant could make an opening statement, call witnesses, cross-examine any witnesses called by the other parties, and that he could make closing submissions based on the law and the evidence. I informed Dr. Winter that he could ask me questions about the proceedings at any time during the hearing, an offer of which Dr. Winter availed himself.
- 5. The applicant called four witnesses, and gave evidence himself, in support of his position. Sixty-one exhibits were filed by Dr. Winter. In coming to the findings of fact outlined below, I have carefully considered all of the oral and documentary evidence before me, the submissions of the applicant and counsel, and the usual factors germane to assessing evidentiary credibility and reliability. I have also assessed what is most probable in the circumstances of the case, and have considered the inferences which may reasonably be drawn from the totality of the evidence. All of the witnesses called gave evidence in a straightforward manner, and to the best of their recollection.

- 6. In order to make sense of the vast amount of evidence called it is worth outlining at the outset of what Dr. Winter complains:
 - 1) that the Faculty Association's leadership was, for the most part, hostile towards him because of his "political creed and past events";
 - 2) that the Faculty Association and/or Professor Ray Brown, the Association's Industrial Relations Consultant, conducted a cursory, perfunctory and narrow investigation of the timeliness issue regarding his grievance, and that the excuse of costs was used to decide not to take his grievance to arbitration. In particular, Dr. Winter notes that the legal opinion obtained by the Faculty Association was from an "in-house" source who not only had a conflict of interest by virtue of being a member of the Faculty Association, but whose opinion was incorrect;
 - 3) that the majority of the Grievance Committee, the Executive Committee and the Council of the Faculty Association acted in a manner which was arbitrary, discriminatory, and in bad faith towards him, and that they did not fully consider the merits of his grievance, the issue of academic freedom, and his argument that the delay issue would not be dispositive;
 - 4) that the then Chair of the Grievance Committee, Professor Brian Etherington, is a lawyer and colleague of Professor Brown, that he concurred in the Brown assessment, and then used his position as a voting member of the various committees to vote and influence others against Dr. Winter's appeals. He is alleged to have acted arbitrarily and in bad faith in that his investigations of Dr. Winter's case were selective, superficial and perfunctory, and his representation of Dr. Winter's case was biased;
 - 5) that members of the Grievance Committee sat as voting members on the Executive Committee on his appeal, and then members of the Executive Committee sat as voting members on the Council on his appeal to that level. Some persons, while they abstained from voting, argued in defence of their earlier decisions, which Dr. Winter suggests is a conflict of interest; and,
 - 6) that several councillors, during the appeal to Council, evidenced hostility and ill-will towards Dr. Winter because of the political views he holds.

THE FACTS

HISTORY OF THE GRIEVANCE, 1984 TO 1994

7. Dr. Winter is an associate professor in the Communications Studies Department of the University of Windsor. He has been there since July 1981, when he started as an assistant professor. Between 1982 and 1986 he was the chair of Graduate Studies for his department. He has written and published one book and has edited others. Dr. Winter has written extensively in his area of expertise and has made numerous presentations. Dr. Winter would describe himself as a union

activist and as someone who has championed the cause of others. For the 1988-89 year he was elected to the Faculty Association's Council. He has also been elected for one other term on the Council and is presently elected to the Council from his Social Science faculty. In addition, since 1981 he has sat on the Council as a substitute on a number of occasions. Dr. Winter has acted as a Grievance Officer twice.

- 8. In 1984 1985 Dr. Winter gave a weekly three minute commentary on the local CBC affiliate radio station in Windsor. In one particular commentary on April 12, 1985 Dr. Winter discussed the case of a female professor who had been by-passed for a permanent tenure-track position in the Political Science Department of the University of Windsor. She was allegedly passed over in favour of a male candidate who was related to a senior professor of that department. A furor resulted from the commentary as some professors at the University felt Dr. Winter should not have aired this matter publicly. However, no disciplinary or other action was taken against Dr. Winter by the University of Windsor in this regard.
- 9. In January 1987 Dr. Winter received a written offer of a tenure-track position as an associate professor and Director of the Centre for Mass Media Studies in the Graduate School of Journalism at the University of Western Ontario. The offer was qualified to the extent that it was subject to the approval of the Vice President, Academic and the Board of Governors. However, in February 1987, after he had accepted the position, and had given notice of his impending departure to the University of Windsor, , he was informed that the offer from the University of Western Ontario had been withdrawn. It appears that Dean Tom Collins, the Vice President, Academic of that university had spoken to some officials of the University of Windsor and had been advised of the CBC incident. Dr. Winter's participation in that radio commentary was characterized by the Windsor officials as improper and as showing a lack of judgment, maturity, and leadership. As a consequence, Dean Collins withdrew the offer made to Dr. Winter.
- In April 1987 Dr. Winter began the process of bringing a grievance against the adminis-10. tration of the University of Windsor. On June 8, 1987 a grievance was formally filed on behalf of Dr. Winter claiming that the University had violated his freedom of discussion and academic freedom, contrary to Article 10 of the collective agreement. The grievance claimed that Gordon Wood, Vice-President, Academic for the University of Windsor, and other Windsor officials told Dean Collins that, based on the CBC incident, Dr. Winter lacked judgment, maturity, and leadership. The remedies sought in the grievance included a payment of \$36,000 (the salary differential for the three year initial contract); that Dr. Winter's future prospects for promotion not be hindered by the views held by those concerned; that Dr. Winter have the right to inspect University files pertaining to him, and to correct any misleading information in those files; that in the future the University of Windsor administration refrain from saying harmful and prejudicial things about Dr. Winter; that Gordon Wood make a public apology; and, because the University of Western Ontario appointment had almost entirely involved research and advising on graduate theses, not teaching, that Dr. Winter's teaching load of six courses be reduced to no more than four courses per year in perpetuity.
- 11. Contemporaneous with the filing of the grievance, Dr. Winter began a civil suit for libel against Gordon Wood and the Board of Governors of the University of Windsor. Dr. Winter also filed a complaint with the Canadian Association of University Teachers (CAUT), Academic Freedom and Tenure Committee, claiming a breach of his academic freedom. Soon after the filing of the grievance the Grievance Committee of the Faculty Association decided that, due to the hear-say nature of the allegations, more information would be needed to pursue the grievance. Professor Don Wallen, the then chair of the Grievance Committee, advised Dr. Winter that the Committee also had some concerns about supporting his remedies regarding financial reimbursement as

there was a lack of precedent for such remedies. Dr. Winter was asked to revise the remedies, but he refused to do so. Despite its misgivings, the Grievance Committee decided unanimously on October 14, 1987 that it would "hold firm in negotiating all the remedies contained in the grievance at this point in time".

12. Following discussions with the University administration an agreement was reached, the substance of which is contained in the following letter dated October 23, 1987 from Professor Bob Kerr, a Vice-President of the Faculty Association, and the then Grievance Committee chair, to Professor Charlie James, the Executive Assistant to the President of the University:

In confirmation of our telephone conversation, I understand that you are agreeable to waive the normal time limits for notification from the Faculty Association of intent to proceed to arbitration in this matter until a reasonable time after the discovery process in Dr. Winter's civil suit has been concluded so that the Faculty Association may have an opportunity to review the documentation exchanged in the civil suit before deciding whether to proceed to arbitration. I would be grateful if you would confirm this.

(emphasis added)

Professor James responded on October 26, 1987 with the following memorandum:

I am writing to confirm that the University is agreeable to waiving the 14 day time limit for notification of intention to proceed to arbitration required by Article 39:13(a) of the Collective Agreement, 1987-1990. My information is that Examinations for Discovery in relation to Dr. Winter's slander action will be conducted shortly and *I will leave it to you to contact me as soon as you are able to do so.*

(emphasis added)

While it is evident from the testimony that Dr. Winter was not happy about the deferral of his grievance pending the outcome of discoveries, and his lawyer, Robert Barlow, contacted Professor Kerr to indicate as much, both Dr. Winter and his lawyer did apparently agree to it. In his letter to Dr. Winter, dated November 5, 1987, Robert Barlow, then of Blaney, McMurtry, Stapells, related his discussion with Professor Kerr, and went on to state: "I agree with John's view [Dr. Winter's brother] that we should perhaps wait to see how the lawsuit unfolds before forcing the grievance committee to complete its inquiries and reach a determination." It is also significant that at that juncture everyone understood that the Grievance Committee had not determined whether it would proceed to arbitration with Dr. Winter's grievance. The Faculty Association did not provide Dr. Winter with the correspondence regarding the deferral of his grievance until March of 1994. However, while Dr. Winter never knew the exact terms of the agreement between the administration and the Faculty Association, it is clear from his lawyer's letter to him dated November 5, 1987, that he knew the salient feature of the agreement. That letter indicates:

I conveyed to him your concerns that the grievance committee is holding off on completing its inquiries pending the results of the examinations for discovery in the litigation.

- 14. The Grievance Committee of the Faculty Association is elected by the membership. The Chair of that committee is also a member of the Executive Committee of the Association. The other four members of the committee are elected for two year terms and may or may not hold some position on the Executive. Executive Committee members are elected and may also be members of the Joint Council of the Faculty Association.
- 15. The examinations for discovery of Gordon Wood and Dr. Winter occurred on March 28, 1988. While Dr. Winter's discovery was not completed at that time, or indeed ever, a transcript of Professor Wood's discovery was sent to Dr. Winter by June 1988. Dr. Winter's discovery was

scheduled to continue on two occasions in 1989, but did not. His counsel, Robert Barlow, had left the firm of Blaney, McMurtry and had joined the firm of Fasken & Calvin. However, since Dr. Winter had not paid an outstanding bill at Blaney, McMurtry, that firm would not release his file to Mr. Barlow. Mr. Barlow appears to have indicated to Dr. Winter that he could not continue without the file, but should be able to get the file by applying to the Court to have it released. Dr. Winter appears never to have paid the former firm and the file was never released. The civil action seems to have stalled in 1989.

- 16. In 1988 the Grievance Committee supported another Winter grievance and took it to arbitration. In that case Dr. Winter had been denied a promotion and it was alleged that Vice President, Academic Gordon Wood had wrongly sat on the committee deciding on the promotion. The grievance was ultimately successful.
- 17. To establish that Dr. Winter had been discriminated against because of his political views, a great deal of evidence was called about Dr. Winter's general activities, about the 1988 Faculty Association elections, the aftermath of that election, and Dr. Winter's editorship of the Association newsletter. Dr. Winter has made presentations to the organized labour movement including to such bodies as the Ontario Federation of Labour and the Canadian Auto Workers Union. An example of his activism on the campus was his role in encouraging the divestment of funds from South Africa in order to remove financial support for the apartheid regime of that time. He is a left wing, progressive activist both at the University and generally in the Windsor community.
- In 1986 Dr. Winter was the Chair of Graduate Studies for the Communications faculty, and was the head of Press Studies. However, he resigned from all of his administrative roles when his colleague, Professor Irv Goldman, was denied tenure after the faculty committee had unanimously recommended him for tenure. Dr. Winter and others wrote to the President of the University, Mr. Ron Ianni, to appeal the denial but were unsuccessful. Dr. Winter became active in Professor Goldman's grievance regarding his situation and participated in organizing demonstrations in support of Goldman. Following a grievance arbitration, Professor Goldman was successful and his situation was to be reconsidered in two years. However, initially the University refused to reinstate Goldman and said it would judicially review the arbitration award. It eventually honoured the award. In the course of this matter Dr. Winter had a difference of opinion with Professor Chatterjee about how the Goldman matter had been handled. Also, it appears Professor Ray Brown, the Industrial Relations Consultant, had recommended against going to arbitration, but Council had decided to take the case forward. Dr. Winter relies on this set of circumstances to advance his contention that Professor Chatterjee was biased against him and for the proposition that Professor Brown can be wrong in his assessment of a situation.
- 19. In and around 1988 some faculty members were dissatisfied with the apparently cozy relationship between the Executive of the Association and the University administration. Therefore, Dr. Winter and others decided to run a slate of progressive candidates for the 1988 election to the Executive and the Council. Election material was sent out to those faculty members who were known to be progressive, and they were asked to consider voting for the slate. Professor Bird took umbrage to the campaign and circulated a memo to his Classics department deploring the activities of Dr. Winter and his compatriots. Some correspondence between Dr. Winter and Professor Bird followed in which Bird referred to Dr. Winter's activities as being of a Marxist nature. It is Dr. Winter's view that after that time Professor Bird has never agreed with him on any issue at a meeting.
- 20. After the election it became obvious that the campaign had been successful and, among

- others, Dr. Winter was elected to the Executive. In his office of Vice President, Internal he also held the position of the Editor of the Association newsletter. Professor Emily Carasco, one of the Winter slate of candidates, became the President of the Faculty Association.
- 21. In August 1988 Dr. Winter published the first edition of the newsletter under his editorship. He saw his role as being pro-active on behalf of the Association, and to take the University administration to task when it was necessary. Up to that time the newsletter had had a collegial rather than a confrontational style. The editions of the newsletter put out while Dr. Winter was the Editor were more combative than had been the norm for the Association.
- At the first Executive meeting after the August newsletter had issued, the President of the Faculty Association, Professor Emily Carasco, signified her discomfort with the new style and Professor Ray Brown, the Faculty Association's legal advisor, had also expressed concern about the tone and content of the newsletter. Following extensive discussion motions passed such that in the future individual grievances or potential grievances could not be identified unless they were going to arbitration, or if the individual grievor gave permission; in future the contents of the newsletter, except for the Editorial and Opinion pages, would be considered the responsibility of the Executive; and, the President, and Vice-President, External would review the content of the newsletter. Any difficulties were to be resolved by the Executive Committee. Professor Chatterjee was instrumental in moving or seconding the motions.
- 23. From that point on every month until December 1988 there were directions given or motions passed to further limit Dr. Winter's editorial powers. Professor Carasco appears to have complained about all manner of things in an effort to limit the Editor's powers and to ensure that newsletter issues were brought to the Executive, rather than left at the sub-committee where she could be outvoted. Finally, on December 12, 1988 there was a motion made to remove Dr. Winter from the Editor position. The motion was defeated, but production of the newsletter was stopped until the Joint Council could consider the matter. On December 14, 1988 a Council meeting was held at which time Dr. Winter was removed from the position of Editor of the newsletter. In and around June 1989, at the end of his term of office as Vice President, Internal Dr. Winter had to give an annual report. Normally that report would be accepted by the Executive first and then printed by the Faculty Association for the General Meeting. The Executive refused to approve Dr. Winter's report and he was forced to have his report printed himself.
- 24. It is undisputed that this sequence of events, and the actions taken against Dr. Winter, were unprecedented in the Faculty Association.
- 25. Between October 1987 and December 1993 there had been sporadic contact between the Grievance Committee and Dr. Winter regarding his unsolicited references grievance. In March 1991, since the Committee had not heard from Dr. Winter about the progress of the discoveries, Don Wallen, the then Chair of the Grievance Committee, spoke to Dr. Winter and asked him what was happening with the lawsuit. In a letter dated March 19, 1991 Dr. Winter wrote to Professor Wallen and said he wished to proceed with his grievance.
- Dr. Winter was invited to attend a Faculty Association Grievance Committee meeting on May 1, 1991 to discuss his grievance. In addition to the Committee members and Dr. Winter, Professor Ray Brown, was present. Professor Brown has been on a retainer with the Faculty Association since the 1970's. He teaches at the Faculty of Law of the University, and is in the Faculty Association himself. There is no dispute that Professor Brown is a labour law scholar. As needed, the Faculty Association Grievance Committee or the Executive refer matters to Professor Brown for legal opinions. When it does so the Association provides him with whatever documentation it has, but it is not customary for Professor Brown to interview the grievor or conduct an investiga-

tion of a situation on his own. The Faculty Association tends to use outside counsel or counsel from the Canadian Association of University Teachers when it needs someone to act on its behalf. It may also seek advice from outside counsel when Professor Brown declares a conflict of interest, or when a question is posed which is outside of his area of expertise.

- At the May 1, 1991 meeting Dr. Winter told the Committee his lawsuit was in abeyance 27. due to his financial constraints and that he owed Mr. Barlow's old law firm \$4,000. Dr. Winter read out sections of the examination for discovery of Gordon Wood to indicate information supportive of his grievance. While Dr. Winter had had the transcript of the discovery since June 1988, he had been told by his counsel that he should not show it to people. Professor Brown indicated that the University of Western Ontario's Dean Collins' evidence was critical to assessing the strength of Dr. Winter's grievance. Dr. Winter said he would try to have Dean Collins examined for discovery. It is now clear that since Dean Collins was not a party to the civil action he could not have been compelled to submit to an examination for discovery without leave of the Court. However, at that juncture, it is clear that Professor Brown was strongly of the view that Dean Collins' discovery was important. After Dr. Winter left the meeting the Committee and Professor Brown discussed the grievance further. They considered whether the issue should be reframed as a policy grievance, but chose not to do that. There was a long discussion about the merits of the grievance, the harm suffered by Dr. Winter, and the decision was made to wait for the discovery process to finish. Professor Brown felt the case was weak at this stage. The Committee began to consider contributing \$3,000 towards Dr. Winter's legal fees to help him continue the discovery process.
- It would appear that Mr. Barlow may not have properly explained to Dr. Winter how costs would mount in the litigation, and as Mr. Barlow did not seek regular payments, Dr. Winter had no idea of the real cost of the lawsuit. When Dr. Winter did not pay Mr. Barlow's first law firm, Mr. Barlow appears not to have fully explained the consequences of such non-payment. It also appears he did not tell Dr. Winter of dates when he was supposed to have been available to continue discoveries, and when the defendants were making motions before the Court. Dr. Winter appears to have believed that his litigation was proceeding, when in reality little progress was being made. Notwithstanding these problems however, it is clear that in May 1991 Dr. Winter had known for one year that his file would not be released from Blaney, McMurtry without him working out a payment schedule to cover his outstanding bill. He also knew that his lawyer needed his file to proceed. He never told the Grievance Committee about any of this because he felt these were technical problems which could be resolved.
- 29. On May 6, 1991, at the next Grievance Committee meeting, the Committee voted unanimously to make the \$3,000 contribution to Dr. Winter's legal fees, especially in light of Professor Brown's suggestion that Dean Collins' evidence was necessary. The motion was moved by Professor Forrest and seconded by Professor Pinto. The Committee also decided not to proceed with the grievance at that time, pending the outcome of the examination for discovery.
- 30. In the normal course the motion should have been forwarded to the Executive to approve the monetary commitment, and a letter should have gone to Dr. Winter informing him of the Grievance Committee's decision. However, as the summer vacation had commenced, the matter was not dealt with, although Dr. Winter was informed of the decisions. In November 1991 Dr. Winter still had not received any confirmation of the motion, nor had he received the money. He asked that the President of the Faculty Association do the letter confirming the allocation because he thought it may be helpful to Mr. Barlow in getting his file. In July 1992 Dr. Winter still had not received this letter. At the Grievance Committee meeting of August 6, 1992 a motion was passed to indicate that if Dr. Winter recovered his costs for the discovery process, he was to repay the \$3,000. In September 1992, after Professor Brown, the Industrial Relations Consultant, had vetted

the letter, it was finally sent to Dr. Winter. In all it took the Faculty Association 16 months to get the letter to the applicant, and in the final analysis, the money was never paid to him. It is unclear whether Dr. Winter ever sent Mr. Barlow the letter, or told Mr. Barlow about the Faculty Association's interest in having Dean Collins examined.

- On November 25, 1992 counsel for the University wrote to inform Dr. Winter that the Ontario Court (General Division) had dismissed his action on *May 2*, *1990*, with costs payable to the defendants. From the Court's order it is apparent that at a status hearing on February 2, 1990 the Court had ordered that the action be listed for trial by May 1, 1990. Since this was not done, on May 2, 1990 the Court had dismissed Dr. Winter's libel action. No one appears to have been told about the dismissal and it was not until late in 1992 that the defendants became aware of it. Dr. Winter's counsel had never informed him of the dismissal.
- At Christmas in 1992 Dr. Winter spoke to his brother, John Winter, a lawyer, about the Court order. However, no further action was taken. In early June 1993 Dr. Winter again spoke to his brother about the Court order, and he claims he then realized the import of it. Between that time and December, 1993 he sought legal advice and attempted to establish what monies he owed the University of Windsor for the civil suit. It was not until December 15, 1993, a year after he had received notice of the dismissal of his civil suit, that Dr. Winter wrote a lengthy letter to the Faculty Association about the dismissal of the civil action, and to request that his grievance be re-activated. He also requested that the Association approve the allocation of \$3,000 which had been set aside for his lawsuit to assist him in paying the \$6,330.53 owing in legal costs of the defendants, as ordered by the Court.
- 33. At this point it had been about 5.5 years since the examinations for discovery had been discontinued, about 3.5 years since the case had been dismissed, and one year since Dr. Winter had known about the dismissal. The extent of the Grievance Committee members' knowledge of the state of the discoveries was what Dr. Winter had told them at the May 1991 meeting. At the January 2, 1994 Grievance Committee meeting a motion passed to reactivate the Winter grievance at Step 3 of the grievance procedure. The Committee agreed to ask the University administration for further documentation and information, and the Committee resolved to consider what would be appropriate remedies.
- 34. In early January 1994 Professor Brian Etherington spoke to the University administration and to Dr. Winter about the case. Dr. Winter was asked what remedies he was still seeking, and he responded with a letter on February 3, 1994. He proposed the following remedies to avoid going to arbitration:
 - that the administration establish a formal agreement with the Faculty
 Association such that administrators not provide references for faculty members unless asked to do so by the faculty members themselves;
 - 2. a written apology from the administration for infringing on his academic freedom and freedom of speech, and for making prejudicial statements which damaged Dr. Winter's academic career;
 - 3. a lump sum payment of \$36,000;
 - 4. that his teaching load be waived for three years, but that his department receive the monetary equivalent to fund five sessional lecture courses for each of the three years; and,

- 5. the administration pay his legal costs totalling approximately \$10,300.
- From the correspondence it is evident that Brian Etherington, on behalf of the Grievance Committee, had met with Dr. Jones of the University administration on January 26, 1994 to inform him that Dr. Winter wished to reactivate his grievance. At that time Professor Etherington asked the administration to provide to the Faculty Association written statements which the administration had taken from those persons alleged to have given the University of Western Ontario references about Dr. Winter. The January 28, 1994 Grievance Committee meeting minutes indicate he and the administration had talked about settling the grievance for Dr. Winter's legal costs and a joint protocol on unsolicited references. Preliminary discussions were held with the Vice- President, Academic who indicated he was willing to write a cautionary note about the type of communication which had led to the Winter grievance, and to have such a note distributed throughout the University. It was common practice for the Faculty Association to explore with the administration remedies, other than those named by the grievor, in an effort to find common ground for a resolution without going to arbitration.
- 36. After receiving Dr. Winter's letter regarding the remedies he was seeking, Professor Etherington again met with the administration and indicated that Dr. Winter was now seeking some different remedies. That letter was also circulated to the Grievance Committee, which was somewhat taken aback by Dr. Winter's list of revised remedies. It was believed what he was seeking would never be possible short of grievance arbitration, even if there had been a good case. It seems clear in retrospect that had Dr. Winter put forward more reasonable settlement terms, Professor Etherington may have considered trying to negotiate them. When Professor Anne Forrest was asked why no one spoke to Dr. Winter about this, she indicated the Grievance Committee does not try to get a grievor to change his/her mind, so it would not have been part of the normal practice to speak to Dr. Winter about his remedy list.
- 37. In late February Professor Etherington again asked the administration for the written statements. However, as Professor Charlie James was away, the administration could not respond at that time. At the March 11, 1994 Grievance Committee meeting Professor Etherington indicated his concern that the grievance would be denied because of the expiry of the time limits. Nonetheless, it was decided that he would write to the administration to ask for further information. On March 21, 1994 Professor Etherington had another meeting with the administration and learned that Professor James felt the grievance was no longer timely as "some reasonable time" after the discoveries were complete had long since expired and the civil action had been dismissed a number of years previously.
- 38. It would appear this was the first indication the Faculty Association Grievance Committee received that the University would be denying the grievance proceeding any further on the basis of delay. In late March 1994 Professor Etherington wrote to the administration to formally request the documentation he was seeking. He also wrote to Dr. Winter to inform him of all of the developments and to tell him that the Grievance Committee was seeking a legal opinion from Professor Ray Brown. The question being referred was the likelihood of the University succeeding in an objection, on the basis of delay, to the grievance being arbitrated. Ray Brown had been sent Dr. Winter's December 1993 eight page letter to the Faculty Association explaining the history of his case and asking to reactivate his grievance, and the correspondence between the Faculty Association and the administration in October 1987 putting the grievance on hold.
- 39. By way of a two-page letter dated April 4, 1994 Professor Ray Brown gave the Grievance Committee his legal opinion that based on the material before him there were no reasonable

grounds for an arbitrator to grant an extension on the time limits for the Winter grievance, and, he opined, an arbitrator was likely to find that the University would be substantially prejudiced by any such extension. In his view "a grievor cannot extend the time of the waiver by being remiss in pursuing discoveries", "even if the fault lies with his lawyers". He felt that an arbitrator would find that once Dr. Winter knew his action had been dismissed he had an obligation to notify the Faculty Association to request re-activation of his grievance.

- 40. Sometime prior to the April 18, 1994 Grievance committee meeting the University formally notified the Grievance Committee that it objected, on the basis of delay, to any attempt to reactivate the Winter grievance. Whether a grievance will proceed to arbitration is decided by the Grievance Committee of the Faculty Association. It may consult with a grievor, but ultimately it is the Grievance Committee which decides on the carriage of any grievance. The Grievance Committee voted not to support the Winter grievance to arbitration. While there were mixed views on the Committee about the academic freedom issue in this grievance, the members of the Committee agreed that it was very likely that an arbitrator would uphold the University's position that the grievance was out of time. While the issue raised in the grievance was important, it was felt that one of the implications of taking a weak case to arbitration was that a bad decision may issue from an arbitrator.
- By letter dated April 21, 1994 Professor Etherington informed Dr. Winter that after considering all of the relevant information, and the legal opinion of Ray Brown, the Grievance Committee had decided not to refer his grievance to arbitration. The reasons given for the decision were the likelihood of success of the University's preliminary objection regarding the unreasonable delay if the matter were referred to arbitration, and, the Grievance Committee's continuing concern about the adequacy of an evidentiary basis for the grievance itself. Dr. Winter was informed of his right to appeal this decision to the Executive Committee of the Faculty Association.
- Throughout the period from January 1994 on Professor Etherington reported on the progress of the Winter grievance to the Executive Committee. That committee met weekly and the Grievance Committee chair was responsible for giving an update on the status of grievances which may be active or moving from one stage to the next in the grievance procedure. The Ray Brown opinion letter had been circulated to the Executive, as had the grievance, and Dr. Winter's letter of December 1993.
- Dr. Winter did avail himself of his right to appeal, and was scheduled to be heard by the Executive Committee on May 25, 1994. However, since there was poor attendance at that meeting, it was suggested by Professor Bruce Tucker, the then President of the Faculty Association, that the matter be put off for a week. Dr. Winter agreed, distributed some additional documentation he would be relying upon, and left the meeting.
- On June 1, 1994 Dr. Winter's appeal was heard by the Executive Committee of the Faculty Association. He gave a five page presentation in which he discussed the delay issue, his view of how it may be dealt with, and how he believed an arbitrator would rule in his favour on the delay issue since the discovery had in fact never been completed. Dr. Winter also noted that the decision to put his grievance on hold had been reached between the Association and the administration, without his participation. Dr. Winter questioned Ray Brown's legal opinion. At appeals it is expected that a grievor/appellant will present his/her own case for reconsideration, and that the Grievance Committee Chair will present that committee' reasons for its decision. Hence, Professor Etherington went over the chronology of the grievance, gave the Grievance Committee's reasons for not recommending that the grievance proceed to arbitration, and he answered questions. He anticipated what the University's arguments would be, what could be expected at arbitration, and

what the risks and possibilities were in the circumstances. After the presentation, Dr. Winter answered questions from the Executive and then left the meeting.

- There was a significant concern about the timeliness problem and Professor Etherington did not agree with Dr. Winter's view that an arbitrator would rule in Dr. Winter's favour. He was of the view that the onus was on Dr. Winter to explain the inordinate delay, and that Dr. Winter did not have a compelling enough reason for that delay. Members of the Executive were divided about the academic freedom issue, some being supportive of Dr. Winter's position. It appears the Executive discussed the material before it regarding the merits of the grievance, and noted that despite efforts made to have the University disclose further information to the Association, there had been no success. Concern was expressed that Professor Bob Kerr, who had brokered the original deal to delay the grievance, was very ill and therefore unavailable for any hearing (He died in the Fall of 1994).
- 46. Thereafter the Executive voted unanimously, by secret ballot, to accept the recommendation of the Grievance Committee not to pursue the grievance to arbitration. It is noteworthy that Professor Etherington and other Grievance Committee members on the Executive agreed to abstain from voting on this issue. The decision was later communicated to Dr. Winter and he was advised of his right to appeal the Executive decision to the Joint Council of the Faculty Association.
- 47. By a letter dated June 17, 1994 the CAUT informed Dr. Winter that it would not be pursuing his complaint any further. The letter from Mariette Blanchette, the Secretary of the Academic Freedom and Tenure Committee states:

Unfortunately, after careful consideration, the Committee came to the conclusion that the *time* period involved in your case cannot be ignored. Furthermore, there is a definite lack of evidence and the Committee came to the conclusion that there is nothing in its mandate or terms of reference which it could use to take action in your case.

(emphasis added)

- Dr. Winter appealed the Executive Committee's decision to the Faculty Association Joint Council. The Council is comprised of between 40 and 44 members, each elected from within his/her departmental unit. It has the final authority within the Faculty Association. On June 22, 1994 Dr. Winter's appeal was the last item on the Council's agenda so it came up towards the end of what are usually about two hour meetings. He had provided the text of his presentation to the members of Council the day before and began to give the presentation orally. Professor Meyer complained to the Chair of the meeting, Professor Bruce Tucker, that Dr. Winter was reading from the presentation. Professor Woodyard said Dr. Winter should be allowed to make his presentation as he wished to. In the interest of fairness it was decided that the written presentation would be circulated to all of the Council members who were not present, that everyone would then have the opportunity to read it, and that a meeting would be scheduled on June 28, 1994 to hear Dr. Winter's presentation more fully. Dr. Winter had no objection to this course of action.
- One week later, on June 28, 1994 Dr. Winter's appeal to the Faculty Association Joint Council was heard. In his ten and one half page, single spaced written presentation distributed on June 22, 1994, Dr. Winter dealt extensively with jurisprudence regarding the issue of delay in bringing a grievance to arbitration. He also discussed the doctrine of promissory estoppel. Dr. Winter explained the reasons for the delay in his case, was of the view that he had exercised due diligence, and felt that the Faculty Association and the administration were partially at fault for the delay. He suggested that the problems of the legal system, and the inaction of his lawyer, were also factors. At the appeal meeting itself Dr. Winter presented a further three and one half page single-

spaced presentation orally. In that presentation he outlined the background to his grievance, read excerpts from the discovery of Gordon Wood, referred to the relevant articles of the collective agreement, in particular those dealing with academic freedom, and he further explained the delay in pursuing the grievance. Dr. Winter discussed case law outlining the factors considered by labour arbitrators in assessing whether to exercise their discretion to allow a case to proceed even when there had been a delay in proceeding to arbitration. He felt he was personally responsible only for six months of the delay, from December 1992 to June 1993.

- Twenty two council members were present at the beginning of the meeting of June 28, 1994, in addition to Dr. Winter and Professor Tucker, the Chair of the meeting. The Council had been provided with all of the documentation on Dr. Winter's grievance, the document he wrote to the Executive on his appeal, and the material he had given to Council for the previous date. Dr. Winter was invited to make his presentation, the substance of which is outlined above. There were then questions from the Council members and responses were given by Dr. Winter and by others. From the oral evidence and the minutes of the meeting it is clear that a full discussion ensued after the presentation.
- There was some support expressed for Dr. Winter's position, and for the proposition that the Faculty Association should protect academic freedom (in a later conversation with Dr. Winter Professor Tucker told him four Council members made "very strong representations" in support of Dr. Winter). Professor Woodyard was impressed with the legal presentation made by Dr. Winter, and he argued at the Council meeting that costs should not be a hindrance to the grievance proceeding. Professor Woodyard also expressed his concern that the academic freedom issue was an important one. However, there were also those who did not feel there had been a breach of academic freedom in this case. There was discussion about the delay, the impact of that delay on the likely success of the grievance, the costs which an arbitration may entail, and the likelihood of success on the merits of the grievance.
- Professor Etherington's role at the Council meeting, and indeed at the earlier Executive meeting, had been to present the view of the Grievance Committee in support of its recommendation, and to answer questions. At the beginning of his tenure as the Grievance Committee chair Professor Etherington had advised the Faculty Association that he was not acting in the capacity of a lawyer and would not be dispensing legal advice or giving legal opinions.
- Mhen the issue of the cost of an arbitration was raised, Professor Meyer said he felt the Association should not spend \$75,000 on this grievance. Professor Meyer appears to have been aggressive and argumentative, as was his style. Dr. Winter describes Professor Meyer as his political enemy within the Association. In order to ensure that the Council was discussing realistic figures, and in order to keep the meeting orderly and fair, Professor Tucker requested that the Association's Resource Officer provide average figures for the cost of Association grievances. Those figures indicated it cost an average of \$8,000 to \$8,500 for a grievance to be arbitrated. Brian Etherington informed the Council that the Winter grievance was unlikely to cost just \$8,500 since it was a complex case. It is undisputed that the Faculty Association was financially sound, but as Professor Tucker pointed out in his testimony, the Association must still decide whether a grievance has merit before it will support it at arbitration.
- 54. There was ongoing discussion about the merits of the grievance. It appears to have been the majority view that there was insufficient evidence to support Dr. Winter's grievance at an arbitration. On the specific issue of academic freedom, Professors Bird and Lewis voiced their views that Dr. Winter's academic freedom had not been violated. Brian Etherington indicated there had been ambivalence at the Grievance Committee and at the Executive Committee about whether

there had been a breach of Dr. Winter's academic freedom. Professor Anne Forrest indicated she felt that academic freedom was an important issue in this case, but that an arbitrator would not get to the merits of the case because it would be dismissed on the basis of delay. Although Professor Forrest heard Dr. Winter's legal submission she was not persuaded by it as she felt he had overstepped his expertise and did not comprehend the legal complexity of the issues.

- The delay issue dominated the discussion at the Council. Professor Etherington explained to the Council the argument the administration could make about the time which had elapsed and that Dr. Winter did not have the extenuating circumstances of suffering from alcoholism or some other incapacitating ailment which could be said to have prevented him from pursuing his grievance in a more timely fashion. Professor Etherington indicated to the Council that he agreed with Professor Ray Brown's legal opinion. Professor Anne Forrest, who had been on the Grievance Committee as well, expressed her view that an arbitrator may never get to the merits of the grievance because the delay argument would be so compelling that an arbitrator would not hear the matter further.
- Dr. Winter expressed his concern that Professor Brown's opinion never dealt with the merits of his grievance (that was not an issue submitted to Ray Brown for his opinion), never considered the doctrine of promissory estoppel, and did not consider whether the language in the collective agreement regarding time limits was mandatory or directory. He told the Council he too had obtained a legal opinion and that it was contrary to that of Professor Brown. However, Dr. Winter never produced this legal opinion, and did not rely upon it at the hearing of this complaint. Dr. Winter has no legal training. Both Dr. Winter and Professor Woodyard contend that the Council was unduly swayed by the legal opinion and Professor Etherington's views because both came from lawyers.
- Dr. Winter was invited to summarize his appeal before he left the meeting, which he 57. did. It is clear that anyone who had anything to say was able to participate in the discussion at this meeting which lasted about two hours. There was no set time for the meeting to end, and discussion only stopped when there was a motion from a Council member to close discussion and move to the vote. The constitution of the Association does not require that when an appeal is heard, that members of the earlier deciding body should abstain from voting on the appeal. Nonetheless, Professor Etherington, the Chair of the Grievance Committee left the meeting so as not to participate in the vote. He also encouraged the members of the Grievance Committee not to vote at the Council, and Professors Forrest and McPhail, who had been on the Grievance Committee, abstained from voting. However, three members of the Executive (Professors Brown [not Ray Brown], Solomon, and Chatterjee) did vote at the Council meeting, despite Professor Tucker's suggestion that they too abstain from voting. Dr. Winter contends that even though the constitution does not address the conflict of interest inherent in people voting when it is their decision that is being appealed, as a matter of conscience people should have abstained. The result of the secret ballot vote was 10 to 6 in favour of supporting the Executive decision not to take Dr. Winter's grievance to arbitration (with two abstentions).
- Professor Tucker subsequently informed Dr. Winter of the outcome of the Joint Council meeting, and that his appeal had failed. On July 19, 1994 Dr. Winter and Professor Tucker had a telephone conversation in which Professor Tucker tried to explain to Dr. Winter how some of the comments made at the Joint Council meeting had to be taken in context, and considered in light of who was making the comments. Professor Tucker asked Dr. Winter his thoughts about the process and procedures utilized by the Faculty Association in relation to the appeal process as he wished to deal with Dr. Winter's apparent concern about conflicts of interest at the various voting levels.

- The Faculty Association sent Dr. Winter a copy of the draft minutes of that meeting so he could make corrections he felt should be made regarding his presentation. Dr. Winter responded on July 25, 1994 with a letter which listed a variety of his concerns, suggested that the text of his presentation be appended to the minutes, and that the minutes more accurately reflect the various interchanges between himself and others. The Association did append his presentation to the minutes, but did not change its usual format for minutes as suggested by Dr. Winter.
- 60. The constitution of the Association has provision for the reopening of debate on a matter decided by the Joint Council if a member who voted in favour of a motion wishes to raise the matter afresh. No one asked to reconsider the Winter matter, so the matter was finally decided at this juncture.
- 61. Following the Council's decision Dr. Winter had some telephone contact with Professor Tucker about the conduct of the Council meeting. On September 1, 1994 Dr. Winter filed this application with the Labour Relations Board.

"ANTI-WINTER ANIMUS"

- 62. In addition to the way in which Dr. Winter's grievance was handled, Dr. Winter has also complained that people within the Faculty Association did not like him, and that he was therefore treated improperly because of what he characterized as an "anti-Winter animus". Dr. Winter based his argument on some of what has already been outlined above. However, Dr. Winter also asked his witnesses about other examples they knew of where Faculty Association members, who had participated in the decision-making about his grievance, had made derogatory comments about him.
- 63. Professor Woodyard's evidence indicated Dr. Winter is not very well liked among most of the people who hold positions of power in the Faculty Association. Specific examples of expressions of these views were not given, and I am therefore unable to rely on this testimony for the proposition that Dr. Winter was viewed unfavourably. It appears that from among the faculty of the University, only three persons are outspoken in their criticism of the administration, and two of those persons are Dr. Winter and Professor Woodyard.
- Or. Bruce Tucker was subpoenaed by Dr. Winter to give evidence for the applicant. He was the President of the Faculty Association during the period when Dr. Winter reactivated his grievance in December 1993 and throughout the appeals in 1994. As President, Professor Tucker chaired the Executive Committee and the Joint Council, and sat as an *ex officio* member of the Grievance Committee. He has no right to vote on the Grievance Committee, and only votes at the other two committees in the event of a tie. He never voted on motions regarding Dr. Winter's grievance.
- 65. Professor Tucker, who identified himself as being on the left of the political spectrum, never heard any person say anything derogatory about Dr. Winter, nor discuss the fact that Dr. Winter is left wing. During the entire process Dr. Winter never raised with him or anyone else at the Faculty Association that he felt Professors Ray Brown and Brian Etherington had a conflict of interest with respect to his grievance. The constitution of the Association does not disallow such voting, but in any event, Dr. Winter never suggested to Professor Tucker at the time of the meeting that there was anything improper about members of the Executive voting at the Council meeting. In any event, Professor Tucker, of his own volition, attempted to get Executive members to voluntarily abstain from voting on the Winter appeal at the Joint Council.
- 66. From all of the evidence it is clear that Professor Ben Meyer is often aggressive and

rude at meetings, and that Dr. Winter was not necessarily singled out in this regard at the Joint Council meeting. However, from Professor Woodyard's evidence it seems Professor Meyer has suggested he does not like Dr. Winter.

- 67. It is apparent from Professor Tucker's experience that Professors Drake and Solomon hold financially conservative views, and that this manifests itself in all sorts of matters. However, it is difficult to see how their views can have any bearing on this complaint since Professor Drake was not at the Council meeting in question, and there is no evidence before me that Professor Solomon spoke on this topic at Dr. Winter's appeal to the Council. There is also no evidence that the potential cost of an arbitration was ever discussed at the appeal to the Executive, at which Professor Solomon was present.
- 68. Dr. Winter called evidence through Professor Anne Forrest about another grievor whose grievance had been taken to arbitration despite an apparent timeliness problem. The issue in that case was quite different from Dr. Winter's, and I am satisfied that the Faculty Association Grievance Committee did not act in a discriminatory fashion towards Dr. Winter in treating his case differently from the other grievor.

REASONS FOR DELAY

- 69. Throughout his testimony Dr. Winter explained what had been happening in his life during the period in question. He admitted that between 1987 and 1991 there was hardly any communication between himself and the Faculty Association. In 1990 he had bought a house in Wheatley, which is some distance from Windsor, so that he and his wife spent a lot of time commuting. Also in 1990 Dr. Winter's first child was born. In the spring of 1991 he tried unsuccessfully to get a lawyer in Windsor to take over his case, so he left it with Mr. Barlow. Dr. Winter believes that Mr. Barlow did not work very diligently on his behalf. In the spring of 1992 Dr. Winter had his last communication from Mr. Barlow. At that time Dr. Winter was told the Court had granted an extension on the time to pursue the lawsuit, but that Dr. Winter had to pay the costs of a motion to the defendants.
- As noted earlier, it was not until late November 1993 that Dr. Winter learned from counsel for the defendants that his civil suit had been dismissed and that costs in the action had been awarded against him. His own counsel never returned his phone calls. Dr. Winter maintains he was confused about the meaning of the dismissal, although he spoke to his lawyer brother about it at Christmas in December 1992. His brother was aghast at what Mr. Barlow had done and encouraged Dr. Winter to go before a judge to have the dismissal overturned on the grounds of Mr. Barlow's negligence.
- Dr. Winter indicated he had been very busy in this period of time, researching and writing articles, doing interviews, and teaching. In 1992 he had sold the house in Wheatley and had moved back to Windsor. In September 1992 his second child was born. In any event, after December 1992, he did not take action on his brother's advice, and claims he still did not fully understand the import of the dismissal. It is Dr. Winter's view that the University should have informed the Faculty Association of the dismissal. He did not do so himself until one year later.
- 72. It was not until June 1993, when Dr. Winter again saw his brother, that he claims he fully realized the implications of the dismissal of his lawsuit. Thereafter Dr. Winter spoke to three lawyers before he decided on June 23, 1993 not to pursue that matter any further. Due to the normal delays in corresponding, it took from July to November 1993 for Dr. Winter to apprise himself of how much he owed in court costs for the judgment against him. On November 25, 1993 Dr. Winter filed a complaint against Mr. Barlow with the Law Society of Upper Canada (which was

ultimately settled to Dr. Winter's satisfaction). Two weeks later he wrote to the Faculty Association and to CAUT to request that his grievance and complaint, respectively, be reactivated. It is Dr. Winter's view that the period of delay which may properly be ascribed to him is from December 1992 to June 1993, because, in his view, this is the period in which he did nothing. Even that, he believes, an arbitrator may have overlooked because Dr. Winter was so busy with his writing and teaching.

ARGUMENTS ON MOTION TO NON-SUIT

- Counsel for the employer intervenor made a motion that the Board should dismiss this application as the applicant's best evidence does not support the allegations he has made. Dr. Winter's evidence, it is argued, demonstrates that Dr. Winter was given every opportunity to present his case to the Faculty Association, and, it is contended, he got a fair and honest review throughout. The intervenor argues that there is no evidence to support a finding that there was "anti-Winter animus", or that any of those who voted at each level of the process acted insincerely or without giving due consideration to the issue before them. It is further suggested that Dr. Winter's expectations of the process go far beyond what is constitutionally required and what is the established practice of the Faculty Association. For the Board to set a standard which requires perfection at each level of decision-making within a union, and for the Board to review each person's individual conduct at each step, would be to set a higher test than that set by the Divisional Court in its review of administrative tribunals.
- 74. The intervenor points out that in 1988-89, after Dr. Winter's participation in the Goldman matter, the Faculty Association took his promotion grievance to arbitration. In 1991, after the 1988 election slate issue, and after the newsletter Editor matter, the Faculty Association unanimously supported a motion to give Dr. Winter \$3,000 towards the discoveries in his civil action. In January 1994, when it would have been a simple matter to deny re-activation of the Winter grievance, the Grievance Committee actively pursued it. All of which, it is argued, belies the applicant's "anti-Winter" animus argument.
- 75. The test which the intervenor recommends to determine whether the "anti-Winter" animus argument can be borne out is threefold. First, the Board should consider whether the applicant has established why people may not like him. Secondly, he must show that in fact people do not like him. Lastly, Dr. Winter must establish that the decision-makers' dislike of him was a factor in the result, i.e. that there must be some nexus established between the animus and the decision.
- 76. The responding party Faculty Association joined the intervenor in its motion to non-suit, arguing that the applicant had failed to produce sufficient evidence to support his allegations that the union had breached its duty of fair representation. The Faculty Association contends that it has conducted itself above and beyond the requirements of section 74 of the Act. Throughout the conduct of Dr. Winter's grievance the Association followed its normal practices and its constitutionally mandated procedures. It is argued that Dr. Winter's complaint is premised on conjecture, innuendo, and a conspiracy theory which was not borne out by the evidence Dr. Winter called.
- 77. It is argued by the Association that throughout Dr. Winter has failed to take responsibility for his role in the delay of his grievance, and that delay contributed to the final outcome of this matter. It is suggested that Dr. Winter is not a quiet or retiring individual who did not pursue matters of concern to him, so the fact that he did not vigorously pursue his own grievance suggests he was not that interested in it for all of that time.

- 78. The responding party urged the Board not to set some different standard of review for faculty associations than is set for other unions, although it was argued this faculty association had done everything it could for this applicant, and that the process it followed was fair in every respect.
- 79. The applicant took two days to argue why the Board should deny the non-suit motion. Dr. Winter's devotion to this complaint was noteworthy, and he is to be commended for the thoroughness of his preparation throughout this hearing. It is Dr. Winter's theory of the case that this Faculty Association has an interest in "getting along" with the University administration, his grievance raised the problem of the "old boys network", and so a tension developed. Added to that was the problem of Dr. Winter being a highly politicized and publicized member of the faculty who had a history of participating in controversial issues. It is his view that the process of deciding not to take his grievance to arbitration was tainted because the decision-makers could not put their views of him aside and did not assess the grievance on its merits, especially the issue of academic freedom.
- 80. Given the sophistication of a faculty association, Dr. Winter argued that the standard to which it is held in a duty of fair representation complaint should be higher than the standard the Board expects less sophisticated unions to meet.
- 81. Dr. Winter is of the view that the Grievance Committee was remiss in not making clear to him that his revised list of remedies was outside of the realm of what it was believed the administration would settle. He was thereby deprived of considering his options before the Committee decided not to take his grievance to arbitration. Dr. Winter argues that Professor Etherington, in any event, should not have been pursuing a deal with the administration, a deal which would have been far less than what the grievor wanted. To have done so is said to demonstrate the withholding of information, abandonment of the grievor, and bad faith on the part of the Association.
- 82. Dr. Winter argued that in reaching its decision not to grant his appeal, the Joint Council of the Faculty Association gave undue regard to the potential cost of an arbitration, and to the views of Professors Etherington and Ray Brown, because of their status as lawyers. He was of the view that Professor Etherington had failed to present the merits of Dr. Winter's grievance, but had rather focused on the problems the grievance would have. With respect to Professor Brown, it is Dr. Winter's contention that Professor Brown has a conflict of interest because he too is a member of the Association. Additionally, Dr. Winter asserts that Professor Brown's legal opinion was wrong.
- 83. The Joint Council did not fully canvass the academic freedom issue, which Dr. Winter contends is evidence of a non-caring and indifferent attitude because it shows the councillors were distracted by issues extraneous to the merits.
- 84. Dr. Winter relied on the testimony which he feels shows that particular individuals within the Faculty Association dislike him because of his past activism on various issues. He argues that the Board should be concerned about how an unpopular member of a trade union is treated by his/her fellow members, should consider that there may be a built-in bias in such situations, and should find that any outcome which is not in the grievor's favour is tainted and cannot stand.
- 85. It was the applicant's view that the delay in moving his grievance forward is not solely his fault, but that the University and the Association also bear a shared responsibility for the delay. In any event, Dr. Winter argued, the Association should have taken the delay issue to an arbitrator for a preliminary ruling, which would not have been costly and could have been dispositive.

DECISION

- 86. As the Board articulated in *D & E Insulation*, [1995] OLRB Rep. June 748, in considering a non-suit motion the standard of proof is whether, on a *prima facie* basis, there is a case for the opposite party, or parties, to answer. In reaching my decision in this case I have assumed all of the evidence called by the applicant to be true.
- 87. In this application the responding party is alleged to have contravened section 74 of the Act. That section reads as follows:
 - 74. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.
- 88. The Labour Relations Act imposes a duty upon a trade union to fairly represent all of the employees in the bargaining unit for which it holds bargaining rights. The trade union may be found to have violated the Act if it has represented an employee in a manner which is arbitrary, discriminatory, or in bad faith. The Labour Relations Board does not consider whether the union was right or wrong in its approach, but rather whether the union's actions were motivated by bad faith, whether it has discriminated against the employee or whether it acted in an arbitrary manner.
- 89. In *Kenneth Edward Homer*, [1993] OLRB Rep. May 433, the Board reviewed the jurisprudence outlining what the Supreme Court of Canada and this Board have found to be the principles applicable to a trade union's duty of fair representation. The following excerpt from the case outlines the guidelines applicable to the case before me:
 - In Canadian Merchant Service Guild v. G. Gagnon, [1984] 1 SCR 509 at page 527, the Supreme Court of Canada reviewed the principles applicable to a trade union's duty of fair representation as follows:
 - 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
 - 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
 - 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of the consequences for the employee on the one hand and the legitimate interest of the union on the other.
 - 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
 - 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

This is both a useful general guideline for assessing a trade union's representation and is consistent with the Board's approach to fair representation complaints.

- 6. Honest mistakes, innocent misunderstandings, simple negligence, or errors in judgement will not, of themselves, constitute "arbitrary" conduct within the meaning of section 69. In other words, a trade union has a kind of "right to be wrong". Terms like "implausible", "so reckless as to be unworthy of protection", "unreasonable", "capricious", "negligent", and "demonstrative of a non-caring attitude" have been used to describe conduct found to be arbitrary within the meaning of section 69 (see, Consumers Glass Co. Ltd., [1979] OLRB Rep. Sept. 861, I.T.E. Industries, [1980] OLRB Rep. July 1001, North York General Hospital, [1982] OLRB Rep. Aug. 1190, Seagram Company Ltd., [1982] OLRB Rep. Oct. 1571, Cryovac, Division of W.R. Grace and Co. Ltd., [1983] OLRB Rep. June 886, Smith & Stone, (1982) Inc., [1984] OLRB Rep. Nov. 1609, Howard J. Howes, [1987] OLRB Rep. Jan. 55, George Xerri, [1987] OLRB Rep. March 444, among others). Such strong words are applicable to the more obvious cases but may not accurately describe the entire spectrum of conduct which could be considered to be arbitrary. As the jurisprudence demonstrates, whether particular conduct will be considered to be arbitrary will depend on the circumstances.
- 7. The term "discriminatory" in section 69 has been interpreted broadly to include all cases in which a trade union distinguishes between or treats members differently without a cogent reason for doing so (see, for example, *The Municipality of Metropolitan Toronto*, [1978] OLRB Rep. Feb. 143, *Douglas Aircraft Co. of Canada Ltd.*, [1976] OLRB Rep. Dec. 779).
- 8. Actions or decisions motivated by hostility, ill-will or other improper considerations constitute "bad faith" within the meaning of section 69 (see, for example, *Chrysler Canada Ltd.*, [1979] OLRB Rep. July 618, *John Farrugia*, [1978] OLRB Rep. Feb. 152, *Leonard Murphy*, [1977] OLRB Rep. March 146, *Canadian Union of Public Employees Local 1000 Ontario Hydro Employees Union (sometimes cited as Walter Princessdomu)*, [1975] OLRB Rep. May 444).
- 9. As I have already indicated, complaints that a trade union has acted in a manner contrary to section 69 of the *Labour Relations Act* often relate to the manner in which the trade union has dealt with a grievance. While the Board does not act as an arbitrator of a grievance in complaints under section 69, facts material to the grievance will generally also inevitably be relevant to an assessment of the trade union's conduct, and, in some cases (see *Angelo Ritrovato*, [1986] OLRB Rep. Oct. 1401 for example) to an assessment of the appropriate remedy if a breach is found. Also relevant to the Board's consideration of a fair representation complaint are the importance of the grievance(s) in question to the complaining employee(s), the implications of the grievance(s) for other bargaining unit employees and the trade union, the degree of consideration given to the matter by the trade union, and the factors, both relevant and otherwise, which the union considered in making its decision.
- 90. The Board recognizes that laypersons usually conduct the union's affairs and such persons may not have the skills or training of a lawyer. Thus the standard union officials must meet is to have honestly considered the merits of the grievance, honestly considered the available evidence, and they must take care not to act on the basis of irrelevant factors or considerations. While honest mistakes or errors of judgement do not amount to a breach of the law, each case must be considered on its own merits (see *Ford Motor Company*, [1973] OLRB Rep. Oct. 519, *ITE Industries*, [1980] OLRB Rep. July 1001, and *Leila Yateman*, [1993] OLRB Rep. Aug. 777).
- 91. I will address each of the allegations made by the applicant in his complaint to the Board, as outlined in paragraph 6 above.
 - 1) The Faculty Association's leadership was, for the most part, hostile towards Dr. Winter because of his "political creed and past events".
- 92. For the purpose of this decision I have assumed that the leadership of the Faculty Association includes anyone who had decision-making authority which affected Dr. Winter's grievance. From the evidence it is clear that from the first instance in early 1987 the Grievance Committee of the Faculty Association supported Dr. Winter's grievance, despite having some reservations about

the kinds of remedies he was seeking and notwithstanding that there were manifest concerns about whether there would be an evidentiary basis to support his grievance.

- 93. In 1988 the Grievance Committee and the Faculty Association supported Dr. Winter's promotion grievance at arbitration.
- 94. In 1991, after the Irv Goldman matter, and after both the 1988 election and the newsletter Editor issues, the Grievance Committee continued to keep alive Dr. Winter's grievance. Moreover, the Committee unanimously voted to give Dr. Winter \$3,000 towards the cost of examinations for discovery in his civil action.
- 95. There is evidence that Professor Chatterjee had expressed his concerns to Dr. Winter about the latter's handling of the Irv Goldman case. It is also apparent that in 1988 Professor Chatterjee moved or seconded some of the motions limiting Dr. Winter's editorial powers during the debates over the newsletter. Professor Chatterjee was on the Executive and the Council for Dr. Winter's appeals in 1994. However, there is no evidence that he said anything during the debates to suggest any animus against Dr. Winter. Since all of the votes were taken by secret ballot, it is impossible to know how Professor Chatterjee voted. I am not satisfied that there is any evidence to support a finding that Professor Chatterjee was hostile towards Dr. Winter, or that there is any evidence to suggest that any improper considerations clouded his consideration of Dr. Winter's appeals.
- 96. Professor Tucker was the President of the Faculty Association during the period of Dr. Winter's appeals. He appears to have kept Dr. Winter informed all along of what was transpiring. There is not a shred of evidence to support a finding that he was, for any reason, hostile towards Dr. Winter. His actions throughout were exemplary, and were designed to ensure that Dr. Winter received the full extent of procedural fairness. Professor Tucker never voted at any level, and he attempted to use moral suasion to encourage others on the Executive committee not to vote on the appeal to the Council. Despite his suggestion, Professors Brown, Chatterjee, and Solomon did vote, but as was noted earlier, since there is no constitutional bar, Professor Tucker could not take any action against them.
- Professor Ben Meyer was not elected to the Joint Council in 1993-1994; however, he attended the Council meeting at which Dr. Winter's appeal was heard. It is accepted practice that other faculty members may attend in the stead of an elected councillor who is unable to do so. At the June 22, 1994 meeting he interrupted Dr. Winter's presentation because he did not wish to have the presentation read to him. Professor Woodyard came to Dr. Winter's defence, and Professor Tucker defused the situation. At the June 28th meeting Professor Meyer suggested that the cost of arbitrating the Winter grievance could be \$75,000. Again, this apparently inflated figure was made reasonable by the interjection of Professor Tucker's actions to obtain the real costs of recent arbitrations. There does not appear to have been an undue emphasis on the issue of the potential cost of an arbitration. Since the union is required to weigh the benefits of a particular grievance being arbitrated against the interests of all of the membership, cost considerations are legitimate concerns for unions.
- 98. A number of witnesses testified that Professor Meyer has an aggressive and rude manner at meetings and that Dr. Winter was not the only brunt of his rudeness. While one cannot condone that type of behaviour, it is difficult to find on the facts before me that Professor Meyer was being hostile towards Dr. Winter because of Dr. Winter's politics or because of past events. In any event, it is clear that Professor Tucker, as chair of the meetings, did his best to contain Professor Meyer's behaviour.

- Professors Bird and Lewis attended the Council meeting and expressed their views that Dr. Winter's academic freedom had not been breached. Professor Bird had, in 1988, shown his displeasure with Dr. Winter around the election slate issue. I am not satisfied that there is enough evidence to support a finding that these two individuals acted in a hostile manner towards Dr. Winter at the Council meeting, nor that there is any evidence to suggest that improper factors clouded their consideration of Dr. Winter's appeal. That meeting was to discuss the pros and cons of Dr. Winter's grievance, and it was entirely appropriate for people to openly discuss their views about the various concerns the grievance raised. It cannot be the case that only those who support a grievor can speak at such a meeting. In fact, Professors Forrest and Woodyard did speak in the applicant's favour on the academic freedom issue. As with the others it is, in any case, impossible to know how any of these individuals voted, but it is worth noting that the outcome of the vote at Council was 10:6 against Dr. Winter. This suggests that six persons of the sixteen who voted supported Dr. Winter's position. This vote outcome belies Dr. Winter's contention that he was such an unpopular member of the Faculty Association that he was treated in a biased manner.
- 100. Nothing turns on the comments made by Professor Tucker to Dr. Winter in July 1994 about Professors Drake and Solomon's fiscal conservatism. Professor Drake was not at either of the Executive and Council appeals. Professor Solomon was at both meetings; however, the issue of the possible cost of arbitration never came up at the Executive, and there is no evidence before me that Professor Solomon participated in the cost discussion at the Council meeting.
- 101. I will address Professor Etherington's role later. From all of the evidence before me I am satisfied that there is no support for the allegation that the leadership of the Faculty Association was hostile towards Dr. Winter because of his political creed or due to past events.
 - 2) The Faculty Association and/or Professor Ray Brown, the Association's Industrial Relations Consultant, conducted a cursory, perfunctory and narrow investigation of the timeliness issue regarding Dr. Winter's grievance, and the excuse of costs was used to decide not to take his grievance to arbitration.
- The evidence indicates that Professor Brown's role is not that of an investigator, but rather to give the Association a legal opinion based upon the information the Association makes available to him. His opinion is sought on specific questions, and is not always followed by either the Executive or the Council. The Irv Goldman grievance was one such example where the Council decided to proceed to arbitration despite Professor Brown's legal opinion. It is noteworthy that in Dr. Winter's case Professor Brown was not present at any of the decision-making meetings regarding his grievance.
- 103. It is undisputed that Professor Brown had before him Dr. Winter's lengthy letter of December 1993, in which he explained why he was now asking the Association to reactivate a grievance filed in 1987. Dr. Winter went to great lengths in that letter to explain what had been happening in the intervening time period. Professor Brown also had before him the letters between the Association and the administration which had set the parameters for the grievance being put on hold in 1987. It was on the basis of these documents that he gave his opinion that an arbitrator would likely uphold a motion made by the University and find that the grievance was no longer timely because of the unreasonable delay in bringing it forward. In particular, he was of the view that Dr. Winter could not provide a reasonable excuse for having waited a year rather than activating the grievance as soon as he knew that the civil suit had been dismissed.
- 104. At the Council meeting Dr. Winter alleged that Professor Brown had not addressed the

merits of his case in the opinion letter. It is clear that was not what Professor Brown was asked to do - he was only asked for his legal opinion on the delay issue.

- There is no support for the allegation that Professor Brown conducted a cursory, perfunctory or narrow investigation of the timeliness issue in this case. Dr. Winter has no legal training and is not himself in a position to judge whether the Brown opinion was wrong. While Dr. Winter does feel the opinion given is incorrect, he had no legal opinion to suggest the contrary. The Board is of the view that Professor Brown's legal opinion was not unreasonable given the facts before him. The Board does not find there to be any conflict of interest in Professor Brown being the Industrial Relations Consultant and a member of the Faculty Association. It is not at all uncommon for a trade union to have "in-house" counsel who advise the union on all manner of issues, and that is the function which Professor Brown appears to fulfill.
- Finally, it is unclear what evidence Dr. Winter is relying on for the proposition that the Faculty Association conducted a cursory, perfunctory, or narrow investigation of the timeliness issue. Dr. Winter submitted to the Grievance Committee his letter of December 1993 to explain the time elapsed in bringing his grievance back on. Had he wished to supplement this explanation it was open to him to do so at any time. At the Executive appeal and at the Council appeal he provided essentially the same information he had given to the Grievance Committee. The timing for the grievance to be reactivated was entirely in the applicant's hands throughout, and it was not possible for the Faculty Association to know when and how things were proceeding in the civil suit without Dr. Winter telling it. It is obvious that he maintained very little contact with the Association on this subject, and indeed, had it not been for Professor Wallen prodding him in 1991, there would have been no contact made by the applicant. I cannot accept Dr. Winter's contention that the Faculty Association and the administration were partially responsible for the delay. Once the grievance was put in abeyance in October 1987 Dr. Winter was the one who would have had to tell the Faculty Association of the progress of the discovery process before the Association could have taken any further action. There was absolutely no reason why the University should have pursued the matter: It was not their grievance, and by the terms of the October 1987 letter from Professor James, the matter was left squarely in the lap of the Association to revive when necessary. The Board can therefore find no merit to this allegation.
 - 3) The majority of the Grievance Committee, the Executive Committee and the Council of the Faculty Association acted in a manner which was arbitrary, discriminatory, and in bad faith towards Dr. Winter, and that they did not fully consider the merits of his grievance, the issue of academic freedom, and his argument that the delay issue would not be dispositive.
- 107. The Grievance Committee in 1987 was chaired by Professor Wallen. He told the applicant there were concerns about the hearsay nature of the grievance, and about the remedies Dr. Winter was seeking. Dr. Winter refused to change the remedies; nonetheless, the Grievance Committee decided to support his grievance at that stage.
- 108. The early correspondence indicates that the Grievance Committee did discuss the merits of the grievance and the academic freedom issue but was not satisfied that there would be sufficient evidence which could be marshalled to support a grievance at arbitration. These discussions appear to have continued every time the Grievance Committee discussed the grievance in any depth. Despite their concerns the members of the Committee continued to strive for more information, and did not drop the grievance. At the 1991 meeting with Dr. Winter it was evident how

dependent the Committee was on Dr. Winter to provide it with the evidence necessary to substantiate the grievance.

- 109. In January 1994, at the applicant's request, the Grievance Committee reactivated his grievance and began to try to find resolutions for the grievance given that Dr. Winter's civil suit had ended without providing the Committee with the information it had been seeking. The Committee hoped to salvage something out of the grievance for the Faculty Association and for the applicant. The applicant was invited to tell the Committee what he would be willing to settle for so as to avoid arbitrating the grievance. It should have been obvious to the applicant at that time that he could no longer realize the remedies he was seeking, but he submitted his proposed remedy list as though nothing much had changed since 1987. Professor Etherington attempted to canvass with the administration a workable resolution to the grievance, but upon the Committee's realization that Dr. Winter was still seeking rather more than was likely to be on the table, settlement talks were abandoned. While Dr. Winter expressed some concern about the Grievance Committee discussing settlement possibilities without his agreement, there was nothing untoward in so doing. The grievance belongs to the Faculty Association and it makes good labour relations sense to attempt to settle grievances to the mutual satisfaction of the Association and the employer, without resorting to the cost and uncertainty of grievance arbitration.
- 110. Professor Etherington made continued attempts from January to March 1994 to get the University to release to the Association the statements which had been collected from people at the time of the original grievance. Nor can one fault his strategy to get the University to take a fresh step so that the Association could then argue that the University had acquiesced to the delay.
- The Grievance Committee obtained a legal opinion on the delay issue. It discussed the academic freedom issue and the merits of the grievance and considered that a case with weak facts could set a bad precedent for the Association. Finally, the Committee was of the view that the delay argument would prevail, so it voted not to take the grievance to arbitration. Professor Etherington wrote and told Dr. Winter of the decision, the Committee's reasons, and of his right to appeal to the Executive.
- On the basis of all of the evidence I am satisfied that the Grievance Committee considered all of the relevant issues, and no irrelevant ones, in reaching its decision.
- As the evidence outlined earlier shows, there is no question that the issues of academic freedom, the merits of Dr. Winter's grievance, and the delay issue were discussed fully at the Executive and Council appeals. At each level Dr. Winter was permitted to make his presentation, to provide the members with written submissions, and to answer questions. It cannot be said that these committees did not consider Dr. Winter's arguments on delay; rather, it is obvious that they were not swayed by those arguments. Not agreeing with Dr. Winter is not tantamount to having acted in an arbitrary fashion.
 - 4) The then Chair of the Grievance Committee, Professor Brian Etherington, is a lawyer and colleague of Professor Brown, he concurred in the Brown assessment, and then used his position as a voting member of the various committees to vote and influence others against Dr. Winter's appeals.
- 114. It is obvious that everyone on the various committees knew that Professor Etherington is a lawyer, as is Professor Brown, and they knew the two men were colleagues in the law faculty. I accept that it is likely that non-lawyer members of the Faculty Association may rely on the opinions of both these individuals when considering matters which have a legal aspect. This is despite

the fact that Professor Etherington had specifically indicated to the Association that he would not be dispensing legal advice. However, there is no breach of the duty of fair representation in this set of circumstances as Professor Etherington merely indicated he agreed with the legal opinion of the Industrial Relations Consultant, which I have found earlier is not an unreasonable legal opinion.

- 115. Professor Etherington's role has been outlined above. He acted in Dr. Winter's interest up until the Grievance Committee decided not to pursue the grievance any further. At that juncture his role changed because thereafter he was called upon to explain and defend the decision of the Grievance Committee to the Executive and to the Council. He was not at the appeals to represent Dr. Winter Dr. Winter was there to do that for himself and to make his case directly and afresh to the Executive and the Council respectively. Professor Etherington cannot therefore be said to have acted in a biased manner towards Dr. Winter because he did not advocate the applicant's position.
- There is no evidence to support an allegation that Professor Etherington acted arbitrarily or in bad faith in his investigation or handling of Dr. Winter's grievance. As the evidence disclosed, Professor Etherington was dogged in his pursuit of information from the administration, he kept Dr. Winter involved throughout, asked for and received correspondence from Dr. Winter, passed on information from Dr. Winter to Professor Brown when the legal opinion had been sought, and informed Dr. Winter of the Grievance Committee's decision, and of his right to appeal. At the Executive and Council meetings he did not vote, and he advised the other members of the Grievance Committee to also abstain.
 - 5) The members of the Grievance Committee sat as voting members on the Executive Committee on Dr. Winter's appeal, and then members of the Executive Committee sat as voting members on the Council on his appeal to that level.
- 117. The evidence contradicts Dr. Winter's allegation that members of the Grievance Committee voted at the Executive and Council meetings. As has been outlined earlier, on Professor Etherington's advice members of the Grievance Committee abstained from voting at the meetings in question.
- 118. Dr. Winter's further allegation is that some of these person spoke against his appeal at the meetings, and he characterizes that as a conflict of interest. There is no reason why people cannot participate in discussions at these meetings, even if they were on earlier committees. Indeed, since it is their committee's decision being reviewed, it is likely they will wish to explain why they reached the decision they did.
- The constitution of the Faculty Association does not prohibit members from one committee participating at another level even if that means they will be voting in an appeal of their own earlier decision. While this seems problematic and basically unfair, it is nonetheless the constitutional framework of this organization. It is clear that three persons from the Executive voted on the appeal to Council, and since Dr. Winter was not present for the voting he was not in a position to challenge them, had he been inclined to do so. While I have some concerns about this practice, in the absence of any prohibition against it in the Association's constitution and since the Board does not involve itself in internal union matters, I reluctantly find there is no breach of the duty of fair representation as regards this matter. In any event, even if these three individuals may be assumed to have voted against the applicant's appeal, had they not voted the outcome would still have been 7:6 against Dr. Winter.

- 6) Several councillors, during the appeal to Council, evidenced hostility and ill-will towards Dr. Winter because of the political views he holds.
- This allegation is not substantially different from Dr. Winter's first allegation that the Faculty Association leadership was hostile towards him because of his political creed and past events. I have dealt with the allegations of hostility arising out of the Council meeting above.

CONCLUSION

- Having considered the applicant's evidence regarding all of his allegations, I have concluded that the non-suit motion must be successful. While I have great sympathy with Dr. Winter's predicament in 1987, I cannot find in all of the ensuing circumstances and on the basis of Dr. Winter's evidence, that the Faculty Association breached its duty of fair representation to Dr. Winter. This application is therefore dismissed.
- Given the length of this case, it seems appropriate to thank all of the parties for their patience and good grace throughout the seventeen days of hearing.

3595-95-G United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, Applicant v. **Zentil Plumbing & Heating Contracting Ltd.**, Responding Party

Arbitration - Construction Industry - Construction Industry Grievance - Grievance delivered to employer and referred to arbitration well beyond time limits contained in collective agreement - While union offering explanation for delay in filing grievance, no explanation given for 8 1/2 month delay in referring grievance to arbitration - Board not satisfied that reasonable grounds existing to extend time limits in collective agreement - Grievance dismissed

BEFORE: Lee Shouldice, Vice-Chair.

APPEARANCES: Brian G. Whitehead, Vince McNeil, Jack Cooney and Armando Rescignio for the applicant; Bill Anderson and Mario Fattore for the responding party.

DECISION OF THE BOARD; February 19, 1996

- 1. This is a referral to the Board of a grievance in the construction industry pursuant to section 133 of the *Labour Relations Act*, 1995 (hereinafter "the Act"). The grievance was referred to the Board for arbitration by the applicant ("hereinafter the union") on January 8, 1996, and came on for hearing on February 6, 1996.
- 2. There is no dispute that the responding party, Zentil Plumbing & Heating Contracting Ltd. ("hereinafter the employer") is bound by the terms of the collective agreement between the Metropolitan Plumbing and Heating Contractors Association and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46 ("hereinafter the collective agreement") for work performed in the high rise portion of the residential sector of the construction industry.

- During the course of the hearing, the Board heard the evidence of the grievor, Mr. Armando Rescignio, and of the General Manager of the employer, Mr. Mario Fattore. The parties also agreed on a substantial core of the facts which were presented to the Board. The Board has considered all of the evidence before it and makes the following findings of fact.
- 4. The grievor entered into a contract of apprenticeship with the employer on or about June 20, 1989. The terms of the contract required the employer to pay a certain percentage of the journeyman's rate to Mr. Rescignio dependent upon the number of hours worked as an apprentice, commencing at 40% of the journeyman rate, and eventually peaking at 80% of the rate during the grievor's 5th year of apprenticeship. A second, amended contract of apprenticeship was entered into between Mr. Rescignio and the employer in 1992 which had the effect of altering the grievor's rate of pay to 85% of the journeyman's rate during his 5th year of apprenticeship.
- 5. Mr. Rescignio received the wages to which he was entitled throughout his apprenticeship until the end of his fourth year of apprenticeship in December, 1993. After that time, the wage which he was paid by the employer was well below the rate to which he was entitled.
- 6. In December, 1993 Mr. Rescignio approached Mr. Fattore and enquired regarding the wage increase that he expected to receive entering into his fifth year apprenticeship. Mr. Fattore advised the grievor that times were tough, money was tight, and that he could not afford to give Mr. Rescignio the increased rate of pay to which he was entitled. The employer did not increase Mr. Rescignio's wage rate at that time. Mr. Rescignio did not approach the union regarding the situation.
- 7. Two similar discussions between Mr. Rescignio and Mr. Fattore took place within ten months of the discussion in December, 1993. In or about March, 1994, Mr. Rescignio approached Mr. Fattore for a letter confirming his employment and salary, for the purposes of purchasing a home. At the time, the grievor asked Mr. Fattore about an increase in his wages. Mr. Fattore replied that the work was slow and, although this was a point of contention between Mr. Rescignio and Mr. Fattore in their testimony, on balance I am also satisfied that Mr. Fattore indicated to the grievor that he could "take it or leave it". Ultimately, the grievor did not approach the union regarding the circumstances and continued to work at the lower rate.
- 8. The final meeting between the grievor and Mr. Fattore respecting Mr. Rescignio's wage rate occurred during October, 1994. Mr. Rescignio, having returned from his honeymoon, asked Mr. Fattore for work and, upon being advised that he could return to work for the employer, enquired regarding the wage rate. The grievor was advised at that time that he would not be provided with a "raise" to the contract rate, because the employer could not afford to pay the contract rate. Again, although this was disputed between the grievor and Mr. Fattore, I am satisfied, on balance, that Mr. Fattore told Mr. Rescignio that he could hire people "off the street" for one-half of the contract rate. Notwithstanding the employer's unwillingness to pay the proper rate to him, Mr. Rescignio returned to work for the employer, and did not advise the union of the situation.
- 9. On or about February 9, 1995, the grievor was laid off. Shortly thereafter, he approached Mr. Jack Cooney, the union's Educational Co-ordinator, and advised him of the circumstances described above. On March 24, 1995, Mr. Cooney wrote to the employer grieving the improper compensation provided to the grievor. One month later, Mr. Fattore responded by asserting that Mr. Rescignio had agreed to the rates paid "due to the economy". The matter was not pursued for over eight months. Ultimately, counsel for the union wrote to the employer on January 5, 1996, advising of the union's intention to refer this grievance to the Board for arbitration.

- 10. Mr. Rescignio testified that he did not contact the union respecting his pay differential because he believed, as a result of Mr. Fattore's comments to him, that his employment with the employer would be ended should he grieve. He testified that he thought that the message Mr. Fattore was sending was that if he did not like the pay level that was being offered, he could leave, and therefore he concluded that to complain to the union would result in his layoff.
- The collective agreement in effect between the parties provides for the submission of grievances and their referral to arbitration. An aggrieved employee is to submit a grievance orally or in writing to his foreman on the job within 48 hours of the occurrence giving rise to the grievance. If a decision satisfactory to the employee is not provided within 48 hours from the submission of the grievance to the foreman, a written submission is to be made to a Joint Conference Board. That Board is required to convene and consider the grievance forthwith, and to give a decision in writing within 4 days of submission of the grievance. If the grievance is not satisfactorily settled by the Joint Conference Board, it may be referred to arbitration within 14 days from the initial submission of the matter to the Joint Conference Board.
- There is no dispute that this grievance was both delivered to the employer and referred to arbitration well beyond the time limits contained in the collective agreement. Accordingly, the parties agreed that the Board must initially consider the question of whether the time limits contained in the collective agreement should be extended by the Board, as is permitted by sections 48(16) and 133(3) of the Act. The relevant provisions of the Act read as follows:
 - **48.** (16) Except where a collective agreement states that this subsection does not apply, an arbitrator or arbitration board may extend the time for the taking of any step in the grievance procedure under a collective agreement, despite the expiration of the time, where the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.
 - 133. (3) Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and subsections 48(10) and (12) to (20) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

Argument was entertained from counsel on the nature and scope of section 48(16) of the Act. During the course of argument, the Board was referred to the following authorities: Sinclair Welding Limited [1981] OLRB Rep. Dec. 1822; The Lummus Company of Canada Limited [1976] OLRB Rep. Jan. 980; Hurlenco Limited [1981] OLRB Rep. June 683; Ontario Hydro [1987] OLRB Rep. April 574; Fernview Construction Limited (Board File 3228-90-G, unreported decision dated April 15, 1991); and Re Bakery Glaco (Ecko Canada Inc.) (1991), 21 L.A.C. (4th) 265.

- 13. It is apparent from a plain reading of section 48(16) of the Act that, before the Board may exercise its discretion to extend the time for the taking of any step in the grievance procedure under a collective agreement, it must be established to the satisfaction of the Board that there are reasonable grounds for the extension of the time limits which have not been observed. On the facts of this case, I am not satisfied that reasonable grounds exist for such an extension.
- Assuming, without deciding, that Mr. Rescignio's explanation for the delay in approaching the union regarding his rate of pay establishes reasonable grounds for extending the time limits contained in the collective agreement, there is no explanation at all from the applicant regarding the delay in referring the grievance to arbitration. On or about April 24, 1995, the union was in receipt of Mr. Fattore's response to the grievance of the union dated March 24, 1995. It would appear that no further word was heard by the employer from the union or its counsel until January 5, 1996, when counsel wrote to the employer to advise that this proceeding would be

launched. Despite the availability of two potential witnesses at the hearing to explain this delay, no testimony was offered by the applicant. There is, accordingly, no explanation, reasonable or otherwise, to account for the 8 1/2 month delay in referring Mr. Rescignio's grievance to arbitration.

15. In all of the circumstances, I am not satisfied that there are reasonable grounds to extend the time limits contained in the collective agreement for the referral of this grievance to arbitration. Notwithstanding that the employer's breach of the collective agreement was blatant and inexcusable, in the circumstances I am required to dismiss this grievance.

COURT PROCEEDINGS

4308-94-M (Court File No. 665) Weston Abattoir Ltd., Barron Poultry Limited, Morrison Meat Packers Limited, Belwood Poultry Ltd. and the Ontario Independent Meat Packers and Processors Society, Applicants v. The Ontario Public Service Employees Union, The Crown in Right of Ontario represented by Management Board of Cabinet - Administrative Unit and the Ontario Labour Relations Board, Respondents

Crown Employees Collective Bargaining Act - Essential Services Agreement - Judicial Review - Natural Justice - Board designating 26 Meat Inspectors as essential but only in order to monitor that no illegal slaughter of animals taking place - Board's order effectively shutting down slaughtering operations at provincially licensed premises - Various meat packers and processors seeking expedited judicial review before single judge on basis of urgency under section 6(2) of Judicial Review Procedure Act (JRPA) - Meat packers alleging that Board's decision patently unreasonable and that failure of Board to give notice to meat packers of Board's proceeding constituting denial of natural justice - Court granting leave to hear application under section 6(2) of JRPA, but dismissing judicial review application

Board decision not reported.

Ontario Court (General Division), Flinn J., February 29, 1996.

Flinn J. (Endorsement): The respondents negotiated a number of essential services agreements under the *Crown Employees' Collective Bargaining Act* ("C.E.C.B"). Others were referred to the Ontario Labour Relations Board (the "Board") pursuant to s.36 of the C.E.C.B. One of them is the matter in issue, which had been referred to the Board for resolution. The hearing before the Board became a pre-hearing which resulted in a negotiated settlement which in turn became a decision of the Board dated May 10, 1995. The agreement and decision did not come to the attention of the applicants until February 1996, nor the details until February 19, 1996.

While communication was made on behalf of the applicants with the respondent union and the Management Board of the Province of Ontario, no communication was held between the applicants and the Board.

The applicants ask the Court for judicial review of the decision dated May 10, 1995, an order quashing the decision insofar as it applied to the meat inspection industry or alternative relief.

While this was an application to the Divisional Court which would generally be heard by three judges, the Court determined from the argument that the matter was one of urgency and that from the nature of the issues involved and the necessities for expedition, the matter ought to be determined by a single judge.

The applicants' position was that there was a failure of natural justice throughout (a) at the outset, by the failure of the Board to give notice of the hearing of the Board to the applicants, and (b) on the face of the record by the decision indicating an excess of jurisdiction.

There was in fact no hearing as such and consequently it was not clear as to the participation of the applicants in what went on before the Board. The position was that the applicants were persons who were prejudicially affected by the decision of the Board to which they were not parties, and having received no notice so that they could be heard, that fact alone violated natural justice. No attempt had been made by the applicants to press this matter before the Board and counsel was frank to admit that there was no right in the Labour Relations Act or the C.E.C.B. as of right to appear before the Board, and so they assumed that the Board would deny standing and the matter would be back before the Divisional Court at all events. In reply argument, counsel for the applicants suggested that application to the Board was more an optional route and that the failure of natural justice with respect to the hearing and indeed as found in the excessive jurisdiction in the decision itself opened the door to an application directly to the court.

There is no doubt but what the decision of the Board as to the level of service to be provided by the meat inspectors in carrying out the obligations of ss. 30 and 34 of the C.E.C.B., coupled with the ensuing strike, has caused and will cause financial loss to the applicants. However, because of the need to expedite the application and reply, the true extent of that loss is in question. Suffice it to say there are alternatives to the slaughter of animals by the applicants, and while it may be awkward, there is no evidence before the Court to indicate that the possibility does not exist.

There is no provision in the Labour Relations Act or the C.E.C.B. requiring notice to be given to those who might be prejudicially affected financially by any decision of the Board. There is then no statutory obligation. Many of the decisions of the Board affect others financially who are not parties, and notwithstanding the able argument of counsel for the applicants that the applicants are carrying on in a licensed industry which give rights of hearing with respect to the licences and indeed to inspectors' actions, the difficulties requiring the Board to give notice to those prejudicially affected in a financial way are a matter of speculation.

There is in the Labour Relations Act and the rules of the Board authority to the Board to reconsider its decision. The C.E.C.B. in s. 36 contains powers to inquire. However, the decision of the Board would indicate that the Board was well aware of the consequences of the essential services agreement which became the decision.

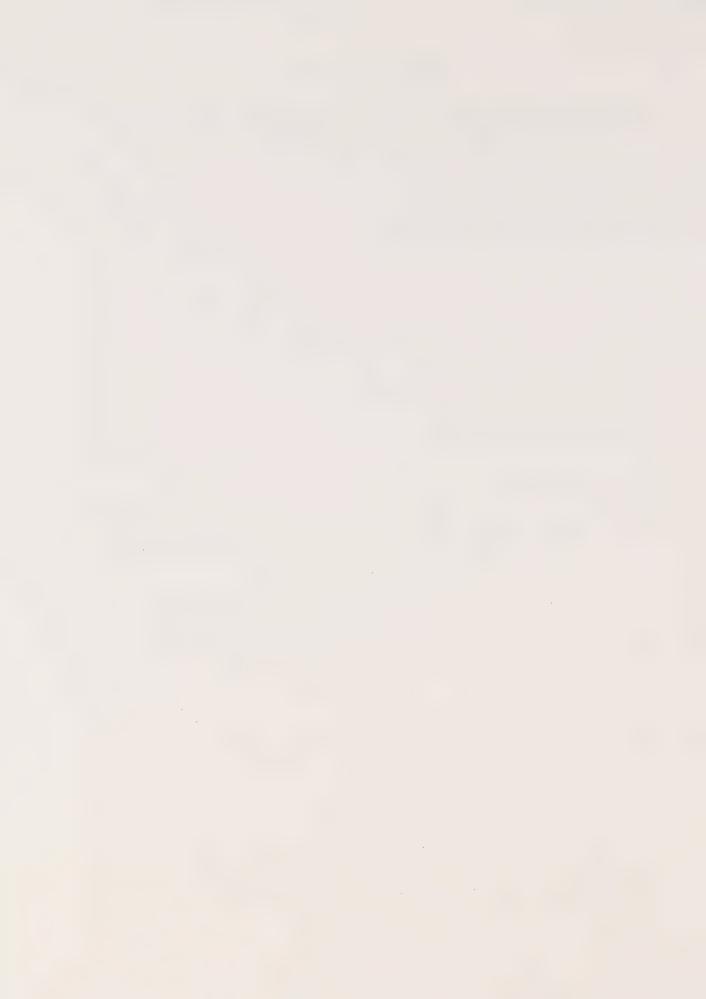
The Court comes to the conclusion, therefore, that the failure to give notice in this instance was not a failure of natural justice.

The decision of the Board dated May 10, 1995 does not in the Court's view violate the requirements of natural justice notwithstanding the unfortunate sentence in para. 1(b). It is argued by the respondent union that it was not intended to be an order of the Board but to be a statement of fact, a conclusion from the first sentence. The Court agrees with the respondent's view with respect to this paragraph, presumption of regularity assists the Court in that conclusion. The decision follows

the requirements of the C.E.C.B. in arriving at an essential services agreement, and in the Court's view there is no failure of jurisdiction. It is perhaps not the agreement or the decision itself which has caused the financial hardship to the applicants but rather the strike.

The application will therefore be dismissed.

The matter is indeed novel, involving recent legislation, the ramifications of which are perhaps not yet known. I am inclined to make no order as to costs. However, should any party wish to make representations in this regard, the Court would be prepared to hear them.







CASE LISTINGS JANUARY 1996

	PAGE
1.	Applications for Certification
2.	Applications for Combination of Bargaining Units
3.	Applications for First Agreement Direction
4.	Applications for Declaration of Related Employer
5.	Sale of a Business
6.	Union Successor Rights
7.	Former Section 64.2 - Successor Rights/Contract Services
8.	Applications for Declaration Terminating Bargaining Rights
9.	Applications for Declaration of Unlawful Strike (Construction Industry)
10.	Complaints of Unfair Labour Practice
11.	Applications for Interim Order
12.	Applications for Religious Exemption
13.	Jurisdictional Disputes
14.	Applications for Determination of Employee Status
15.	Complaints under the Occupational Health and Safety Act
16.	Hospital Labour Disputes Arbitration Act (Unfair Labour Practice)
17.	Construction Industry Grievances
18.	Applications for Reconsideration of Board's Decision



APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 1996

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0006-95-R: United Brotherhood of Carpenters and Joiners of America, Local 1988 (Applicant) v. Bolger Steel Fabricating (Respondent) v. International Association of Machinists and Aerospace Workers (Intervener)

Unit: "all carpenters and carpenters' apprentices in the employ of Bolger Steel Fabricating in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Bolger Steel Fabricating in all sectors of the construction industry in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0351-95-R: United Steelworkers of America (Applicant) v. Tisdelle Enterprises c.o.b. as Tim Hortons Donuts (Respondent) v. Group of Employees (Interveners)

Unit: "all employees of Tisdelle Enterprises c.o.b. as Tim Hortons Donuts in the City of London, save and except floor managers, persons above the rank of floor manager and office administrator" (82 employees in unit)

1618-95-R: Canadian Union of Public Employees (Applicant) v. Laidlaw Waste Systems Limited (Respondent)

Unit: "all employees of Laidlaw Waste Systems Limited at its Landfill site located in the regional municipality of Ottawa-Carleton save and except maintenance administrator, supervisors, persons above the rank of supervisor, office, sales, laboratory technical staff, students employed during the school vacation period." (11 employees in unit)

2396-95-R: The United Brotherhood of Carpenters and Joiners of America, Local 3054 (Applicant) v. Dean's Kitchen Centre Limited c.o.b. as The Top Shop (Respondent)

Unit: "all employees of Dean's Kitchen Centre Limited c.o.b. as The Top Shop in the City of London, save and except supervisors, persons above the rank of supervisor, office and sales staff and persons regularly employed for not more than 24 hours per week" (3 employees in unit)

2407-95-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. McMichael Construction Inc. (Respondent)

Unit: "all journeymen and apprentice carpenters in the employ of McMichael Construction Inc. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen, and persons above the rank of non-working foreman" (2 employees in unit)

2411-95-R: Ontario Nurses' Association (Applicant) v. Services de santé de Chapleau Health Services (Respondent)

Unit: "all paramedical and technical personnel of Services de santé Chapleau Health Services in the Township

of Chapleau, save and except supervisors and persons above the rank of supervisor and physiotherapist" (4 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

2434-95-R: United Steelworkers of America (Applicant) v. Pillar Plastics Limited (Respondent)

Unit: "all employees of Pillar Plastics in the City of Vaughan, save and except supervisors, person above the rank of supervisor, office, clerical and sales staff" (61 employees in unit)

2458-95-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Spantec Constructors Ltd. (Respondent)

Bargaining Agents Certified Subsequent to Vote

2240-95-R: Canadian Union of Public Employees (Applicant) v. Versa Services Limited (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener)

Unit: "all employees of Versa Services Ltd. employed in the Housekeeping Department at the Montfort Hospital, save and except supervisors, persons above the rank of supervisor and students employed during the school vacation period" (43 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	40
Number of persons who cast ballots	28
Number of ballots marked in favour of applicant	27
Number of ballots marked in favour of intervener	1

2637-95-R: United Steelworkers of America (Applicant) v. 930943 Ontario Limited (Respondent)

Unit: "all employees of 930943 Ontario Limited in the Town of Dunnville, save and except facilitators, persons above the rank of facilitator, office, clerical, and sales staff" (83 employees in unit)

Number of names of persons on revised voters' list	92
Number of persons who cast ballots	30
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	27
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	3

2774-95-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Servocraft Limited (Respondent)

Unit: "all employees of Servocraft Limited in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical and sales staff and employees for whom any other trade union holds bargaining rights on October 24, 1995" (3 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

2778-95-R: Ontario English Catholic Teachers' Association (Applicant) v. North of Superior District Roman Catholic Separate School Board (Respondent)

Unit: "all occasional teachers employed by the North of Superior District Roman Catholic Separate School Board in its elementary and secondary panels in the Town of Marathon, the Townships of Nakina, Red Rock, Darian, Nipigon, Schreiber, Terrace Bay, Manitonwadge and the unorganized localities of Lake Superior and Nipigon-Red Rock, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the School Boards and Teachers Collective Negotiations Act" (50 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	22
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

2852-95-R: Communications, Energy & Paperworkers Union of Canada (CEP) (Applicant) v. Imperial Oil, a partnership of McColl-Frontenac Petroleum Inc. and Imperial Oil Limited (Respondent)

Unit: "all employees of Imperial Oil, a partnership of McColl-Frontenac Petroleum Inc. and Imperial Oil Limited in the City of Nanticoke, save and except supervisors, persons above the rank of supervisor, distribution centre employees, office, sales and clerical staff and students employed during the school vacation period" (172 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	173
Number of persons who cast ballots	164
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	162
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	94
Number of ballots marked against applicant	68
Number of ballots segregated and not counted	2

3012-95-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. D. Millman Market Services Inc. (Respondent)

Unit: "all employees of D. Millman Market Services Inc. engaged in telemarketing and marketing services in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (150 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list 420	
Number of persons who cast ballots 30.	3
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	0
Number of segregated bands east by persons whose names appear on voter sust	8
Number of segregated ballots cast by persons whose names do not appear on voters' list 1.	5
Number of spoiled ballots	1
Number of ballots marked in favour of applicant 17	8
Number of ballots marked against applicant 10	2
Number of ballots segregated and not counted 2	2

3039-95-R: Service Employees International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Marriott Management Services (Respondent)

Unit #1: "all employees of Marriott Management Services at Trinity College in the Municipality of Metropol-

itan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff and employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (40 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	3

Unit #2: (see Applications for Certification Dismissed without vote)

3055-95-R: Ontario Nurses' Association (Applicant) v. The Canadian Red Cross Society Blood Services, Sudbury Centre (Respondent)

Unit: "all Registered Nurses employed in a nursing capacity by the Canadian Red Cross Society, Blood Services, Sudbury Centre, in or out of Sudbury, save and except Assistant Nursing Managers and persons above the rank of Assistant Nursing Manager" (13 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	12
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	0

3245-95-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Hospitality Services (Respondent)

Unit: "all employees employed by Hospitality Services in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office, sales and accounting staff" (7 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	7

3325-95-R: Service Employees International Union, Local 204 Affiliated with the A.F. of L., C.I.O., C.LC. (Applicant) v. The Ontario Jockey Club (Respondent) v. United Plant Guards Workers of America, Local 1962 (Intervener)

Unit: "all security guards of The Ontario Jockey Club, save and except Corporals, Detectives, office staff, persons regularly employed for not more than 24 hours per week and persons covered by subsisting collective agreements" (90 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	99
Number of persons who cast ballots	70
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	55
Number of ballots marked in favour of intervener	15
Number of ballots segregated and not counted	0

3329-95-R: Canadian Union of Public Employees (Applicant) v. Avoca Foundation (Respondent)

Unit: "all employees of Avoca Foundation in the County of Renfrew, save and except Executive Director, persons above the rank of Executive Director, Administrative Secretary Bookkeeper and one person from the classification of Outreach Co-ordinator" (18 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	2

3345-95-R: International Association of Heat and Frost Insulators and Asbestos Workers Local 95 (Applicant) v. Inseal Contracting Inc. (Respondent)

Unit: "all journeymen and apprentice insulators and asbestos workers in the employ of Inseal Contracting Inc. in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons listed as in dispute	0
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3368-95-R: Association of Allied Health Professionals: Ontario (Applicant) v. Queensway General Hospital (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: "all paramedical employees of the Queensway General Hospital in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, students performing work as part of a co-operative high school program, students performing work as part of an internship or apprenticeship as part of a University program, students performing work as part of a placement from a community college program, students employed during a vacation period, and employees in bargaining units for which any trade union held bargaining rights as of the application date" (64 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	111
Number of persons who cast ballots	90
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	62
Number of ballots marked against applicant	27
Number of ballots segregated and not counted	1

3376-95-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 853 (Applicant) v. Control Fire Systems Ltd. (Respondent)

Unit: "all sprinklerfitters and sprinklerfitters' apprentices in the employ of Control Fire Systems Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all sprinklerfitters and sprinklerfitters' apprentices in the employ of Control Fire Systems Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of

Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3377-95-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Great Lakes MSR Lumber Limited (Respondent)

Unit: "all employees of Great Lakes MSR Lumber Limited in the City of St. Catharines, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (32 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	24
Number of segregated ballots cast by persons whose names appear on voter's list	24
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

3392-95-R: Communications, Energy & Paperworkers Union of Canada (CEP) (Applicant) v. Benjamin Film Laboratories Limited (Respondent)

Unit: "all employees of Benjamin Film Laboratories Limited in the Municipality of Metropolitan Toronto, save and except independent drivers and contractors, Personnel Assistant, Accounts Payable Clerk, Sales Department, Supervisors and persons above the rank of Supervisor" (78 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	62
Number of persons who cast ballots	62
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	58
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	37
Number of ballots marked against applicant	21

3394-95-R: United Steelworkers of America (Applicant) v. C.A.W. Canada Family Education Centre (Respondent)

Unit: "all employees of C.A.W. Canada Family Education Centre at Saugeen Township, RR #1, Port Elgin, save and except Director, persons above the rank of Director, C.A.W. National Staff members, all salaried supervisors, all office personnel including secretaries, bookkeepers, front desk personnel and child care workers" (75 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	76
Number of persons who cast ballots	61
Number of ballots marked in favour of applicant	61
Number of ballots marked against applicant	0

3395-95-R: United Steelworkers of America (Applicant) v. Sara Lee Bakery Canada (Respondent)

Unit: "all employees of Sara Lee Bakery Canada, employed at its retail outlet store in the City of Brampton, save and except Managers and persons above the rank of Manager, constitute a unit of employees of the responding party appropriate for collective bargaining" (19 employees in unit)

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	11
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	11

3413-95-R: Canadian Union of Public Employees (Applicant) v. Regional Municipality of Waterloo (Respondent)

Unit: "all employees of the Regional Municipality of Waterloo in its operations regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, office, clerical, technical and laboratory staff, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of December 14, 1995" (10 employees in unit) (Having regard to the agreement of the parties)

16
8
6
2
6
2

3414-95-R: Labourers' International Union of North America Local 183 (Applicant) v. ServiceMaster Contract Services Mississauga (Respondent)

Unit: "all employees of ServiceMaster Contract Services Mississauga engaged in cleaning at Vista Cargo, 6500 Silver Dart Drive in the City of Mississauga, save and except non-working forepersons, persons above the rank of non-working forepersons, clerical and sales staff" (11 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3479-95-R: United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (Applicant) v. 1147182 Ontario Limited, c.o.b. as Walker Finishing (Respondent)

Unit: "all employees of 1147182 Ontario Limited, c.o.b. as Walker Finishing in the City of Windsor, save and except supervisor and persons above the rank of supervisor" (4 employees in unit) (Having regard to the agreement of the parties)

Number of persons who cast ballots	4
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0

3516-95-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Redacor Industries Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Redacor Industries Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Redacor Industries Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3588-95-R: Canadian Union of Public Employees (Applicant) v. Kinark Child and Family Services (Respondent)

Unit: "all employees of Kinark Child and Family Services in the Town of Cobourg and in the Town of Campbellford, save and except Supervisors, persons above the rank of Supervisor, clerk secretary and psychologists" (2 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	3

3616-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Manac, A Division of the Canam Manac Group Inc. (Respondent)

Unit: "all employees of Manac, A Division of the Canam Manac Group Inc. in the City of Orangeville, save and except Team Leaders and Supervisors, persons above the rank of Team Leader or Supervisor, office, clerical and sales staff, Security Guards and students employed during the school vacation period" (220 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	191
Number of persons who cast ballots	191
Number of ballots excluding segregated ballots cast by persons whose names appear o	n
voter's list	177
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' li	st 13
Number of spoiled ballots	1

Number of ballots marked in favour of applicant	93
Number of ballots marked against applicant	84
Number of ballots segregated and not counted	13

3625-95-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Village of Elora (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

Unit: "all employees of the Corporation in the Public Works Department and the Elora and District Community Centre save and except non-working foremen, those above the rank of non-working foremen, office and clerical staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week," (7 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked in favour of intervener	0
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Without Vote

0273-95-R: Hospitality & Service Trades Union, Local 261 (Applicant) v. Commonwealth Hospitality Ltd. c.o.b. as Holiday Inn (Market Square) (Respondent) v. Paul Noiseaux and René Lemire, In Trust (Intervener)

3039-95-R: Service Employees International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Marriott Management Services (Respondent)

Unit #1: (see Bargaining Agents Certified subsequent to a Post-Hearing vote)

Unit #2: "all employees of Marriott Management Services at Trinity College in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (40 employees in unit)

Applications for Certification Dismissed Subsequent to Vote

1942-95-R: Labourers' International Union of North America, Local 527 (Applicant) v. Les Industries Rol. Manufacturing (Canada) Ltee/Ltd. (Respondent)

Unit #1: "all employees of Les Industries Rol. Manufacturing (Canada) Ltee/Ltd. in the City of Cornwall, save and except shopforeman, persons above the rank of shopforeman, office staff, persons regularly employed for not more than twenty four hours per week and students employed during the school vacation period and pending resolution by the Board excluding as well group leaders/foremen" (37 employees in unit)

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	29
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	16
Number of ballots segregated and not counted	4
Number of names of persons on revised voters' list	32
Number of persons who cast ballots	29
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	25

Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	16
Number of ballots segregated and not counted	4

2727-95-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. North America Construction (1993) Ltd. (Respondent) v. Christian Labour Association of Canada (Intervener)

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the responding party in all other sectors in Board Areas No. 17 and 22, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	6
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener	4

2945-95-R: Local Union 636 of the International Brotherhood of Electrical Workers (Applicant) v. The Corporation of the Regional Municipality of Haldimand-Norfolk (Respondent) v. Canadian Union of Public Employees and its Local 3455 (Intervener)

Unit #1: "all outside employees of The Corporation of the Regional Municipality of Haldimand-Norfolk, employed in the Environmental Services Department, save and except persons employed as technical staff including radio operators, persons above the rank of foreman, office, clerical, technical employees and Regional Emergency Services Dispatcher, persons covered by a subsisting Collective Agreement, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (40 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	36
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	36
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	16
Number of ballots marked in favour of intervener	20
Number of ballots segregated and not counted	0

3122-95-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 71 (Applicant) v. Sanclar Constructors Ltd. (Respondent)

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Sanclar Constructors Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Sanclar Constructors Ltd. in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	()
Number of segregated ballots cast by persons whose names do not appear on voters' list	()
Number of spoiled ballots	()
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

3199-95-R: United Food & Commercial Workers, Local 206 Chartered by the United Food and Commercial Workers International Union, CLC, AFL-CIO (Applicant) v. Future Bakery Ltd. (Respondent)

Unit: "all delivery drivers and/or driver salesmen employed by Future Bakery Ltd. in the Municipality of Metropolitan Toronto, save and except manager, and persons above the rank of Manager" (12 employees in unit)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	0

3373-95-R: United Steelworkers of America (Applicant) v. The Brick Warehouse Corporation (Respondent)

Unit: "all employees of The Brick Warehouse Corporation at 1165 Kennedy Road and 18 Nantucket Blvd. in the City of Scarborough, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff and students employed during the school vacation period" (46 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	44
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	43
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	27
Number of ballots segregated and not counted	1

3388-95-R: Canadian Union of Public Employees (Applicant) v. Doug Roe Enterprises Ltd. c.o.b. Mid Ontario Disposal (Respondent)

Unit: "all employees of Doug Roe Enterprises Ltd. c.o.b. Mid Ontario Disposal in the County of Simcoe save and except foreman and persons above the rank of foreman" (2 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list Number of persons who cast ballots	51 39
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	39
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1

Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	37
Number of ballots segregated and not counted	0

3566-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Sun Chemical Limited General Printing Ink Division (Respondent)

Unit: "all employees of Sun Chemical Limited at its General Printing Ink Division in the City of Burlington, save and except supervisors, persons above the rank of supervisor, office, clerical and quality control employees, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week" (45 employees in unit)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	44
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	43
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	29
Number of ballots segregated and not counted	1

3617-95-R: United Food & Commercial Workers, Local 206 chartered by the United Food and Commercial International Union C.L.C., A.F.L. - C.I.O. (Applicant) v. Taco Bell of Canada, Division of Pepsi-Cola Canada Ltd. (Respondent)

Unit: "all employees of Taco Bell of Canada, Division of Pepsi-Cola Canada Ltd., save and except Assistant Managers and persons above the rank of Assistant Manager" (43 employees in unit)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	21
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	21
Number of names of persons on revised voters' list	19
Number of persons listed as in dispute	16
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	15

Applications for Certification Withdrawn

1929-95-R: International Union of Bricklayers and Allied Craftsmen Local #2, Toronto, Barrie and the Ontario Provincial Conference of the I.U.B.A.C. (Applicant) v. Columbus Building Systems Ltd. (Respondent)

2850-95-R: International Alliance of Theatrical Stage Employees (I.A.T.S.E. Local 580) (Applicant) v. Cleary International Centre (Respondent)

2981-95-R: National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Charity House Windsor (Brentwood Recovery Home) (Respondent)

3421-95-R: Canadian Hotel and Service Workers Union (Applicant) v. The Toronto Prince Hotel (Respondent) v. Hotel Employees Restaurant Employees Union, Local 75 (Intervener)

3450-95-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the City of Hamilton (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

1907-95-R: International Union, United Plant Guard Workers' of America (Applicant) v. Burns International Security Services Limited (Respondent) (*Terminated*)

FIRST AGREEMENT - DIRECTION

3300-95-FC: United Steelworkers of America (Applicant) v. Greenberg Stores Limited (Respondent) (*Endorsed Settlement*)

3326-95-FC: I.W.A. - Canada, L. 2693 (Applicant) v. Leo Sakata Electronics (Canada) Ltd. (Respondent) (Withdrawn)

3408-95-FC: Labourers' International Union of North America, Local 1059 (Applicant) v. Robinson Farm Drainage Limited (Respondent) (*Endorsed Settlement*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3945-94-R: Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Begg & Daigle Limited, Gamma Interior Contractors, Jesse Agnew Design and Planning Consultants Inc. (Respondents) (*Dismissed*)

1299-95-R; 1301-95-R: International Union of Bricklayers and Allied Craftsmen, Local 5 and International Union of Bricklayers and Allied Craftsmen, Local 23 (Applicant) v. 789256 Ontario Ltd. c.o.b. Jim's Masonry and A & A Masonry (Respondents); Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Local 1089 (Applicant) v. 789256 Ontario Ltd. c.o.b. as Jim's Masonry and A Mesko Masonry Inc. (Respondents) (Endorsed Settlement)

1628-95-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. James Finlay c.o.b. as Finlay Electrical Service, James Finlay c.o.b. as New Dimensions Project Management (Respondents) (*Endorsed Settlement*)

1969-95-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. 541907 Ontario Limited c.o.b. as Days Inn Toronto Downtown, The Second Cup Ltd., Maxine Becker and Larry Rosenberg c.o.b. as The Second Cup (Respondents) (*Withdrawn*)

2197-95-R: United Food And Commercial Workers International Union, Local 999 (Applicant) v. GFS Canada Inc. and Maple Leaf Foods Inc. (Respondents) (Withdrawn)

2386-95-R: International Union of Operating Engineers, Local 793 (Applicant) v. J-AAR Excavating Limited and/or 756949 Ontario Ltd. (Respondents) (*Withdrawn*)

2476-95-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Local 46 (Applicant) v. Danmatt Mechanical Contracting Ltd., and Fix-It-All Plumbing & Heating Inc. (Respondents) (*Endorsed Settlement*)

3017-95-R: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Power Line Sharon Construction Inc., Sharon High Voltage Construction Ltd., Sharon High Voltage Developments Ltd., Sharon High Voltage Inc., Power Station Construction, and 1096748 Ontario Ltd. (Respondents) (*Terminated*)

3410-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 195 (Applicant) v. Tecumseh Metal Products, A Division of TMP Acquisition Inc.,

Huron Steel Products Inc., HSP 101 Inc. (Respondents) v. Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 880 (Intervener) (Withdrawn)

3629-95-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Strathroy Concrete Forming (1988) Inc. and Edward J. Baker (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

3945-94-R: Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Begg & Daigle Limited, Gamma Interior Contractors, Jesse Agnew Design and Planning Consultants Inc. (Respondents) (*Dismissed*)

1299-95-R; 1301-95-R: International Union of Bricklayers and Allied Craftsmen, Local 5 and International Union of Bricklayers and Allied Craftsmen, Local 23 (Applicant) v. 789256 Ontario Ltd. c.o.b. Jim's Masonry and A & A Masonry (Respondents); Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Local 1089 (Applicant) v. 789256 Ontario Ltd. c.o.b. as Jim's Masonry and A Mesko Masonry Inc. (Respondents) (*Endorsed Settlement*)

1628-95-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. James Finlay c.o.b. as Finlay Electrical Service, James Finlay c.o.b. as New Dimensions Project Management (Respondents) (Endorsed Settlement)

1684-95-R: United Food and Commercial Workers, Locals 175 and 633 (Applicant) v. Valdi Foods (1987) Inc. and Valdi Foods 1995 Inc. (Respondents) (*Granted*)

1969-95-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. 541907 Ontario Limited c.o.b. as Days Inn Toronto Downtown, The Second Cup Ltd., Maxine Becker and Larry Rosenberg c.o.b. as The Second Cup (Respondents) (Withdrawn)

2198-95-R: United Food And Commercial Workers International Union, Local 999 (Applicant) v. GFS Canada Inc. (Respondent) (Withdrawn)

2386-95-R: International Union of Operating Engineers, Local 793 (Applicant) v. J-AAR Excavating Limited and/or 756949 Ontario Ltd. (Respondents) (*Withdrawn*)

2476-95-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Local 46 (Applicant) v. Danmatt Mechanical Contracting Ltd., and Fix-It-All Plumbing & Heating Inc. (Respondents) (*Endorsed Settlement*)

2672-95-R: Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders' International Union (Applicant) v. Panagiotis Christodoulou, Demetrius Christodoulou, 1107077 Ontario Inc. c.o.b. as Winchester Hotel (Respondent) (*Granted*)

3017-95-R: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Power Line Sharon Construction Inc., Sharon High Voltage Construction Ltd., Sharon High Voltage Developments Ltd., Sharon High Voltage Inc., Power Station Construction, and 1096748 Ontario Ltd. (Respondents) (*Terminated*)

3410-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 195 (Applicant) v. Tecumseh Metal Products, A Division of TMP Acquisition Inc., Huron Steel Products Inc., HSP 101 Inc. (Respondents) v. Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 880 (Intervener) (*Withdrawn*)

3629-95-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Strathroy Concrete Forming (1988) Inc. and Edward J. Baker (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

0280-95-R: Cold Springs Farm Employees' Association (Applicant) v. Cold Springs Farm Ltd. (Respondent) v. Darren J. Jones (Local 200), Chris R. Coates (Local 200) (Interveners) (*Withdrawn*)

0299-95-R: Amalgamated Transit Union, Local 1587 (Applicant) v. Can-Ar Transit Services, Division of Tokmakjian Limited (Respondent) (*Withdrawn*)

3289-95-R: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union 598 (Applicant) v. Eastern Gunite & Sandblasting, Division of Oakville Custom Swim Pools Ltd. (Respondent) (*Granted*)

FORMER SECTION 64.2 SUCCESSOR RIGHTS/CONTRACT SERVICES

2749-94-R: Christian Labour Association of Canada (Applicant) v. Burns International Security Services Ltd. (Respondent) v. International Union, United Plant Guard Workers of America, Local 1962 (Intervener) (*Withdrawn*)

3585-94-R: Canadian Union of Professional Security Guards (Applicant) v. Bramalea Centres Limited and North American Security Services Inc. (Respondents) v. United Steelworkers of America (Intervener) (*Terminated*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2058-94-R: John Williams and Gerald Brethour (Applicants) v. Teamsters Local Union 230, affiliated with the International Brotherhood of Teamsters (Respondent) (*Terminated*)

0215-95-R: Kevin Smith and Clifford Wilkinson (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Elirpa Construction and Materials Limited (Intervener)

Unit: "all employees of Elirpa Construction and Materials Limited in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills, and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering, in the Regional Municipality of Durham, in all sectors of the construction industry excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foremen" (0 employees in unit) (Granted)

Number of names of persons on revised voters' list Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	7
Number of ballots segregated and not counted	0

2452-95-R: Josh Sukhnandan (Applicant) v. Union of Needletrades, Industrial and Textile Employees (Respondent) v. Royal Shirt Co. Ltd. (Intervener)

Unit: "all employees of the Royal Shirt Co. Ltd. in the City of Vaughan, save and except supervisors, persons above the rank of supervisor, office and sales staff" (47 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	68
Number of persons who cast ballots	53
Number of spoiled ballots	2
Number of ballots marked in favour of respondent	44
Number of ballots marked against respondent	7
Number of ballots segregated and not counted	0

2687-95-R: Ulysse Desmarais (Applicant) v. Industrial Wood and Allied Workers of Canada, I.W.A. Canada, Local 2693 (Respondent) v. Coretech/Sonoco Limited (Intervener)

Unit: "all employees of Coretech/Sonoco Limited employed in Kenora, save and except Floor Supervisors, persons above the rank of Floor Supervisor, and office and clerical staff" (6 employees in unit) (*Granted*)

2755-95-R: Anna Lamb, on her own behalf and on behalf of a group of employees of Paul Noiseaux and René Lemire, In Trust (Applicant) v. Hospitality & Service Trades Union, Local 261 (Respondent) v. Paul Noiseaux and René Lemire, In Trust (Intervener)

Unit: "all employees of Paul Noiseaux and René Lemire, In Trust, c.o.b. as Holiday Inn, Ottawa Centre, in the City of Ottawa, save and except the manager, assistant manager, supervisors and those above the rank of supervisor, front office and front desk staff" (51 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	54	
Number of persons who cast ballots	45	
Number of ballots excluding segregated ballots cast by persons whose names appear on		
voter's list	41	
Number of segregated ballots cast by persons whose names appear on voter's list	4	
Number of segregated ballots cast by persons whose names do not appear on voters' list	0	
Number of spoiled ballots	0	
Number of ballots marked in favour of respondent	12	
Number of ballots marked against respondent	29	
Number of ballots segregated and not counted	4	

2845-95-R: Joanne Turpin (Applicant) v. Labourers' International Union of North America, Local 527 (Respondent) v. Crane Canada Inc. (Intervener)

Unit: "all employees of Crane Canada Inc., at its Crane Supply Division in the City of Ottawa, save and except supervisors, those above the rank of supervisor, office and clerical staff, sales staff and students" (8 employees in unit) (Granted)

2894-95-R: Donovan Miller & Harry Harbajan (Applicant) v. Ontario District Council of the Union of Needletrades, Industrial and Textile Employees (UNITE) (Respondent) v. The G. H. Group of Companies (Division of G. H. Imported Merchandising & Sales Ltd.) (Intervener) (*Granted*)

2982-95-R: Jim Morris, et al (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Lafarge Construction Materials division of Lafarge Canada Inc. (Intervener)

Unit: "all employees (of the employer) of the Concrete Block Plant at Cataraqui in the Township of Kingston, save and except foremen, persons above the rank of foremen, office and sales staff" (11 employees in unit) (Granted)

11 9
nes appear on
9
ter's list 0
on voters' list 0
0
1
İ

Number of ballots marked against respondent
Number of ballots segregated and not counted

8

2983-95-R: Peter T. Sherk (Applicant) v. Communications, Energy and Paperworkers Union of Canada Local 91-0 Toronto Typographical Union (Respondent) (*Dismissed*)

3037-95-R: Lenore V. Boucher (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. Westfair Foods Limited (Intervener)

Unit: "all employees employed by the Company in or in connection with its offices in the City of Thunder Bay, save and except Branch Manager, Assistant Branch Manager, Credit Manager, Department Manager, Accountant, Salespersons, Retail Councillors, Merchandisers, Confidential Secretary and persons above those ranks" (2 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2
Number of ballots segregated and not counted	0

3096-95-R: Joanne Turpin (Applicant) v. Labourers' International Union of North America, Local 527 (Respondent) v. Crane Canada Inc. (Intervener)

Unit: "all employees of Crane Canada Inc., at its Crane Supply Division in the City of Ottawa, save and except supervisors, those above the rank of supervisor, warehouse employees, sales staff and students all employees of Crane Canada Inc., at its Crane Supply Division in the City of Pembroke, save and except supervisors, those above the rank of supervisor, office and clerical staff, sales staff and students" (21 employees in unit) (Granted)

3173-95-R: Employees of Lecours Motor Sales (Applicant) v. IWA Canada Local 1-2995 (Respondent) v. Jean Paul Lecours Ltd. (Intervener)

Unit: "all employees of Jean Paul Lecours Ltd., save and except managers, persons above the rank of manager, office employees, janitors, new and used car salesmen and students employed after school hours" (4 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4
Number of ballots segregated and not counted	0

3190-95-R: Caressant Care Nursing Home of Canada, Limited (Applicant) v. Canadian Union of Public Employees and its Local 2037 (Respondent) (*Terminated*)

3307-95-R: Bernard N. Read (Applicant) v. Communications, Energy and Paperworkers Union of Canada and its Local 324-1 (Respondent) v. Trilake Timber Company (1992) Limited (Intervener)

Unit: "all employees in the District of Kenora, save and except supervisors, persons above the rank of supervisor, office and sales personnel and students employed during the school vacation period" (21 employees in unit) (Dismissed)

Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on	Į.
voter's list	20
Number of ballots marked in favour of respondent	11
Number of ballots marked against respondent	9

3346-95-R: H.B. Etlin Company Ltd. (Applicant) v. Canadian Autoworkers Union Local 512 (Respondent) v. A. Lalla (Objectors) (*Granted*)

3349-95-R: The Employees of Concrete Systems 799316 Ont. Inc. (Applicant) v. Labourers' International Union of North America, Local 1089 (Respondent) (Withdrawn)

3357-95-R: Stephen Vetrecin (Applicant) v. United Food and Commercial Workers International Union, Local 633 (Respondent) v. Longo Brothers Fruit Markets (Intervener)

Unit: "all full time Meat Department team members of Longo Brothers Fruit Markets Inc. in Burlington, Ontario, save and except Manager and persons above the rank of Manager" (6 employees in unit) (Granted)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	4
Number of ballots segregated and not counted	0

3361-95-R: Terry Pleau, on his own behalf and on behalf of a group of employees of Colonial Furniture Company (Ottawa) Ltd. (Applicant) v. Retail, Wholesale/Canada, C.S.S.D. of the U.S.W.A. (Respondent) v. Colonial Furniture Company (Ottawa) Ltd. (Intervener)

Unit: "all employees of Colonial Furniture Company (Ottawa) Ltd. at its warehouse operation at Cumberland, save and except group leaders, supervisors, persons above the rank of supervisor, office, clerical and sales staff and students employed during the school vacation period. The scope of the bargaining unit shall be in accordance with the Minutes of Settlement April 19, 1988" (26 employees in unit) (*Granted*) (*Clarity Note*)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	25
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	11
Number of ballots marked against respondent	14
Number of ballots segregated and not counted	0

3375-95-R: Archie Nimmo and Paulette Johnson (Applicants) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 252 (Respondent) v. Depco International Inc., Dualex Division (Intervener)

Unit: "all employees of Depco International Inc., Dualex Division at 340 Rexdale Blvd., Rexdale, save and except supervisors, persons above the rank of supervisor, technical employees, office and clerical staff" (85 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	116
Number of persons who cast ballots	84
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	15
Number of ballots marked against respondent	68

3381-95-R: Tracy McLellan, Jennifer Faulkiner, Sharon Haviland, Mary-Lou Reeves, Maxine Rapai, Donna Dempsey (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Dismissed*)

3391-95-R: Sydney J. Langill (Applicant) v. Christian Labour Association of Canada, Local 302 (Respondent) v. Inn on the Twenty Ltd. (Intervener) (*Granted*)

3401-95-R: Law Development Group (Applicant) v. Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Respondent) (*Dismissed*)

3402-95-R: Rhonda MacDougall, on her own behalf and on behalf of a group of employees of FJS Holdings (c.o.b. as My Cousins' Restaurant) (Applicant) v. Hospitality & Service Trades Union, Local 261 (Respondent) v. FJS Holdings Ltd. (c.o.b. as My Cousins' Restaurant) (Intervener)

Unit: "all employees of FJS Holdings Ltd. (c.o.b. as My Cousins' Restaurant) in the City of Ottawa, save and except managers, persons above the rank of manager, head chef and office and clerical staff' (35 employees in unit)(Granted)

Number of persons who cast ballots	32
Number of ballots, excluding segregated ballots, cast by persons whose names appear on	
voters' list	30
Number of segregated ballots cast by persons whose names appear on voters' list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	0
Number of ballots segregated and not counted	0

3418-95-R: Dalibor Michalek (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 303 (Respondent) v. Del Equipment Ltd. (Intervener)

Unit: "all employees of Del Equipment Ltd. in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, employees regularly employed for not more than twenty-four hours per week and students employed during the school vacation period" (63 employees in unit) (Dismissed)

Number of names of persons on revised voters' list	62
Number of persons who cast ballots	59
Number of ballots marked in favour of respondent	32
Number of ballots marked against respondent	27

3441-95-R: John Keith Dance (Applicant) v. Labourers International Union of North America, Local 1059 (Respondent) v. Robinson Farm Drainage Limited (Intervener) (*Withdrawn*)

3489-95-R: Registered Nurses of St. Charles Village Local 089 (Applicant) v. Ontario Nurses' Association (Respondent) v. St. Charles Village (Intervener) (*Granted*)

3610-95-R: Keven Twentyman (Applicant) v. Canadian Union of Public Employees (Respondent) (Dismissed)

3630-95-R: Queensway Carleton Hospital (Applicant) v. International Union of Operating Engineers, Local 796 (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

3362-95-U: Budd Canada Inc. (Applicant) v. The National Union United Automobile Aerospace and Agricul-

tural Implement Workers of Canada (CAW) and its Local 1451, and its officers, officials and agents set out in Schedule "A" (Respondent) (Withdrawn)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1846-94-U: Teamsters Local Union No. 879 (Applicant) v. Propak Limited (Respondent) (Withdrawn)

0418-95-U; 3104-95-U; 3034-95-u: Hospitality & Service Trades Union, Local 261 (Applicant) v. F.J.S. Holdings (c.o.b. as My Cousin's Restaurant) (Respondent); Marina MacLean and Christina Eyamie (Applicant) v. Hospitality & Service Trades Union Local 261 (Respondent) (Withdrawn)

0502-95-U: Amalgamated Transit Union, Local 1587 (Applicant) v. Can-Ar Transit Services, Division of Tokmak jian Limited (Respondent) (*Withdrawn*)

0539-95-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Atlantic Packaging Products Ltd. (Respondent) (*Withdrawn*)

0569-95-U: William (Bud) Perry (Applicant) v. International Union of Operating Engineers, Local 793 and Ontario Hydro (Respondent) (*Withdrawn*)

0586-95-U: Labourers' International Union of North America, Local 527 (Applicant) v. Crane Canada Inc. (Respondent) (*Withdrawn*)

0670-95-U: Mr. Vince de Paepe (Applicant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Respondent) (*Terminated*)

1626-95-U: Thomas Eastman (Applicant) v. United Steelworkers of America (Respondent) v. Continuous Colour Coat Ltd. (c.o.b. as Metal Koting) (Intervener) (Terminated)

1718-95-U: Zeljko Mijaljevic (Applicant) v. Communications, Energy and Paperworkers' Union of Canada, Local 544 (Respondent) v. General Electric Canada Inc. (Intervener) (*Dismissed*)

1780-95-U: Greenline Resins Inc. (Applicant) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 141 (Respondent) (Endorsed Settlement)

2111-95-U: Teamsters Union Local 141 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union 141 (Applicant) v. Greenline Resins Inc. (Respondent) (Endorsed Settlement)

2436-95-U: United Steelworkers of America (Applicant) v. Pillar Plastics Limited (Respondent) (Withdrawn)

2545-95-U: Greenline Resins Inc. (Applicant) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 141 (Respondent) (*Endorsed Settlement*)

2601-95-U: Shi Lien Chau (Applicant) v. Amalgamated Transit Union, Division 113 (Respondent) v. Toronto Transit Commmission (Intervener) (*Withdrawn*)

2679-95-U: Victoria/University Hospital (Applicant) v. Ontario Public Service Employees Union (Respondent) (Withdrawn)

2697-95-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. The Warehouse Drug Store Ltd., c.o.b. as Hy & Zel's (Respondent) (Withdrawn)

2905-95-U: Louie Jannetta (Applicant) v. Labourers' International Union of North America, Local 506 (Respondent) (*Terminated*)

- **3000-95-U:** Greater Ottawa Truckers Association on behalf of its members; and Lloyd Griffith; Henry Benoit; Willard Hayes; and Ron Deavy (Applicant) v. Teamsters Local Union 91 and Castor Dispatch Services Ltd. (Respondents) v. The National Capital Road Builders Association (Intervener) (*Withdrawn*)
- **3058-95-U:** Kathy Boyle (Applicant) v. UFCW, Local 391W (Respondent) v. Coca-Cola Foods Canada Inc. (Intervener) (*Withdrawn*)
- **3082-95-U:** Robert Purcell (Applicant) v. Steve Bobas CAW Local 222 Representative (Respondent) v. General Motors of Canada Limited (Intervener) (*Dismissed*)
- **3100-95-U:** Labourers' International Union of North America, Local 1059 (Applicant) v. Phil MacDonald, Woollatt Building Materials Inc. Woollatt Building Supplies Inc. (Respondent) (*Endorsed Settlement*)
- 3131-95-U: Paul Simon (Applicant) v. Service Employees International Union, Local 204 Staff Union (Respondent) v. Brewery, General and Professional Workers Union (Intervener) (Withdrawn)
- 3152-95-U: Rory O'Neill (Applicant) v. Local 43 of CUPE (Respondent) (Dismissed)
- 3156-95-U: Elizandro Baides (Applicant) v. Metro Parks & Culture (Respondent) (Dismissed)
- 3171-95-U: Terry Wayne Small (Applicant) v. Intertec Investigations & Security, Ltd. (Respondent) (Dismissed)
- **3200-95-U:** United Food & Commercial Workers, Local 206 Chartered by the United Food and Commercial Workers International Union, CLC, AFL-CIO (Applicant) v. Future Bakery Ltd. (Respondent) (*Withdrawn*)
- **3211-95-U:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario (as represented by Management Board of Cabinet) (Respondent) (*Withdrawn*)
- **3214-95-U:** Canadian Union of Professional Security Guards (Applicant) v. Elite Building Services Inc. (Respondent) (*Endorsed Settlement*)
- **3283-95-U:** Tisdelle Enterprises Limited c.o.b. Tim Horton's (Applicant) v. United Steelworkers of America and John Henson (Respondent) (*Dismissed*)
- **3284-95-U:** Balvir Gill (Applicant) v. Union International Association of Machinists and Aerospace Workers (Respondent) (*Withdrawn*)
- **3305-95-U:** Teamsters Local Union 91 (Applicant) v. Anchor Concrete Products Limited (Respondent) (Withdrawn)
- **3312-95-U:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 71 (Applicant) v. Sanclar Constructors Ltd. (Respondent) (Withdrawn)
- **3330-95-U:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. Modern Building Cleaning Inc. (Respondent) (*Withdrawn*)
- **3344-95-U:** United Food and Commercial Workers International Union (Applicant) v. K. Leaders' Food Market c.o.b. as Knectels Food Market (Respondent) (*Withdrawn*)
- **3350-95-U:** London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Salvation Army, London (Respondent) (*Withdrawn*)
- 3356-95-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Dualex Enterprises Inc., a Division of Depco International Incorporated (Respondent) (Withdrawn)

3369-95-U: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Mose Drywall Services Ltd. (Respondent) (*Endorsed Settlement*)

3389-95-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Great Lakes MSR Lumber Limited (Respondent) (Withdrawn)

3399-95-U: United Automobile, Aerospace and Agricultural Implement Workers of America (Applicant) v. Mom's Cafeteria (Respondent) (Withdrawn)

3445-95-U: Ontario Public Service Employees Union (Applicant) v. Sea Land Holding Corp. c.o.b. as Great Lakes College of Toronto (Respondent) (*Withdrawn*)

3458-95-U: Clifford D. Hood (Applicant) v. Queen's University Kingston and C.U.P.E. Local 229 (Respondents) (*Withdrawn*)

3490-95-U: Louie Nota (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) (*Withdrawn*)

3505-95-U: United Food and Commercial Workers International Union, Local 999 (Applicant) v. GFS Canada Inc. and Maple Leaf Foods Inc. (Respondents) (Withdrawn)

3564-95-U: Anthony Broomfield (Applicant) v. Cargill Food and , Local 633 (Respondents) (Dismissed)

3575-95-U: Christian Labour Association of Canada (Applicant) v. Lutheran Nursing Home Inc. (Owen Sound) (Respondent) (Withdrawn)

3609-95-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Auto-Pak Ltd. (Respondent) (Withdrawn)

3628-95-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Strathroy Concrete Forming (1988) Inc. and Edward J. Baker (Respondents) (*Withdrawn*)

3639-95-U: Tony Urciuoli (Applicant) v. H.E.R.E. Local Union 75 (Respondent) (Dismissed)

APPLICATION FOR INTERIM ORDER

3212-95-M: Ontario Public Service Employees Union (Applicant) v. The Crown in the Right of Ontario (As Represented by Management Board of Cabinet) (Respondent) (Dismissed)

APPLICATIONS FOR RELIGIOUS EXEMPTION

2669-95-M: Alice (Lisa) ValDora Yantzi (Applicant) v. ONA - Local 139, Grand River Hospital Corporation (K-W Health Centre) (Respondents) (*Withdrawn*)

JURISDICTIONAL DISPUTES

3165-94-JD: Ironworkers' District Council of Ontario International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Nicholls-Radtke Ltd., International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Respondents) (*Dismissed*)

3901-94-JD: Association of Allied Health Professionals: Ontario (Applicant) v. Ontario Nurses' Association, and Sudbury & District Health Unit (Respondents) (*Dismissed*)

2961-95-JD: Labourers' International Union of North America, Local 506 (Applicant) v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America and Rapid Forming Inc. (Respondents) (*Granted*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2170-95-M: Canadian Union of Public Employees and its Local 167 (Applicant) v. The Corporation of the City of Hamilton (Respondent) (*Endorsed Settlement*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3393-94-OH: Robert Winfield and CAW Local 222 (Applicants) v. Dave Robinson and General Motors of Canada Limited (Respondents) (*Withdrawn*)

0939-95-OH: Alec Morris (Applicant) v. Canada Demolition, 1117865 Ontario Inc. (Respondent) (Granted)

1312-95-OH; 2081-95-OH: W. McNaught - Danforth Health & Safety Committee, P. Quibell, J. Mullins (Applicants) v. Toronto Transit Commission (Respondent); W. McNaught, J. Mullins, G. Spears, M. Bertoia, W. Moore and P. Quibell (Worker Committee Members) (Applicant) v. The Toronto Transit Commission (Respondent) (Withdrawn)

2851-95-OH: James A. Hasson (Applicant) v. Premco Machine Ltd. (Dieter Frey) (Respondent) (Dismissed)

3216-95-OH: Istvan Banyai (Applicant) v. Ever-Reddy Duplicating Service Inc. (Respondent) (Dismissed)

3343-95-OH: Robert Myciak (Applicant) v. Temp Cast Enviro Heat Ltd. (Respondent) (Endorsed Settlement)

HOSPITAL LABOUR DISPUTES ARBITRATION ACT (Unfair Labour Practice)

0392-95-U: Association of Allied Health Professionals: Ontario (Applicant) v. Ottawa Children's Treatment Centre (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

2016-93-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Duffy Mechanical Contractors Limited, DuraSystems Barriers Inc. (Respondents) (*Endorsed Settlement*)

3376-93-G: Labourers' International Union of North America, Local 527 (Applicant) v. Mount Royal Concrete Floor (Canada) Ltd., Mount-Royal Contracting, Mount-Royal Contracting Ltd. Mount-Royal Concrete Floor Ltd., Mount Royal Concrete Floor Ltd., BMH Contracting Ltd., and Construction M.R.C. Ltee (Respondents) (*Withdrawn*)

4255-93-G: Ontario Allied Construction Trades Council on its own behalf and on behalf of the International Brotherhood of Painters and Allied Trades, Local 1590 and on behalf of the United Brotherhood of Carpenters and Joiners of America, Local 2222 and Millwrights and Machine Erectors Local 1592 (Applicant) v. Ontario Hydro and Electrical Power Systems Construction Association (Respondents) (*Withdrawn*)

3584-94-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Aikenhead's Home Improvement Inc. and Home Depot (Respondents) (*Withdrawn*)

0356-95-G: Sheet Metal Workers' International Association, Local 504 (Applicant) v. The State Group Limited (Respondent) v. International Brotherhood of Boilermakers, Iron Ship Builders. Blacksmiths, Forgers and Helpers, Local 128 (Intervener) (*Withdrawn*)

0577-95-G: Semple-Gooder Roofing Ltd. (Applicant) v. Sheet Metal Workers' International Association, Local 269 (Respondent) (*Withdrawn*)

1098-95-G; 3614-95-G: Labourers' International Union of North America. Local 1059 (Applicant) v. J.D. Masonry (Respondent) (Endorsed Settlement)

1203-95-G: International Union of Painters and Allied Trades, Local 1819 (Applicant) v. M & I Aluminum Ltd., Commercial Aluminum Limited and Commercial Aluminum (1993) Ltd. (Respondents) (*Granted*)

1298-95-G; 1300-95-G: International Union of Bricklayers and Allied Craftsmen, Local 5 and International Union of Bricklayers and Allied Craftsmen, Local 23 (Applicant) v. 789256 Ontario Ltd. c.o.b. Jim's Masonry and A & A Masonry (Respondents); Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Local 1089 (Applicant) v. 789256 Ontario Limited, c.o.b. as Jim's Masonry, A Mesko Masonry Inc. (Respondents) (Withdrawn)

1658-95-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Launi Masonry Ltd. (Respondent) (*Granted*)

1821-95-G: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. James Finlay c.o.b. Finlay Electrical Service, James Finlay c.o.b as New Dimensions Project Management (Respondents) (Endorsed Settlement)

2236-95-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Waltex Drywall Systems Ltd. (Respondent) (*Withdrawn*)

2385-95-G: International Union of Operating Engineers, Local 793 (Applicant) v. J-AAR Excavating Limited, 756949 Ontario Ltd. (Respondents) (Withdrawn)

2399-95-G: Labourers' International Union of North America - Local 247 (Applicant) v. Rose Mechanical Ltd. (Respondent) (*Withdrawn*)

2475-95-G: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Locals 46, 463, 599, 666 and 221 (Applicant) v. Danmatt Mechanical Contracting Ltd., Fix-It-All Plumbing & Heating Inc. (Respondents) (*Endorsed Settlement*)

2571-95-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. City of Toronto (Respondent) (*Withdrawn*)

2626-95-G: Labourers' International Union of North America, Local 493 (Applicant) v. R.M. Belanger Limited (Respondent) (*Withdrawn*)

2648-95-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Power Line Sharon Construction Inc. (Respondent) (*Terminated*)

2816-95-G: Carpenters & Joiners Local 494 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Toronto Dominion Bank (Respondent) (Withdrawn)

3016-95-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Power Line Sharon Construction Inc., Sharon High Voltage Developments Ltd., Sharon High Voltage Construction Ltd., Sharon High Voltage Inc., Power Station Construction, 1096748 Ontario Ltd. (Respondents) (*Terminated*)

3025-95-G; 3026-95-G; 3159-95-G; 3160-95-G; 3161-95-G; 3525-95-G: International Union of Bricklayers and Allied Craftsmen, Local 28 (Applicant) v. Tilechem Limited (Respondent) (*Endorsed Settlement*)

3109-95-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Board of Governors of Exhibition Place (Respondent) (*Withdrawn*)

3188-95-G: International Union of Operating Engineers, Local 793 (Applicant) v. State Contractors Inc. (Respondent) (*Withdrawn*)

3196-95-G: United Brotherhood of Carpenters and Joiners of America, Local 446 (Applicant) v. Jaddco

- Anderson Limited (Respondent) v. Labourers' International Union of North America, Local 1036 (Intervener) (Withdrawn)
- **3293-95-G:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 (Applicant) v. Nicholls-Radtke Ltd. (Respondent) (*Withdrawn*)
- **3294-95-G:** Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Nelmar Drywall (Respondent) (*Endorsed Settlement*)
- **3339-95-G:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Visentin Steel Fabricators Ltd. (Respondent) (*Endorsed Settlement*)
- **3370-95-G:** Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Mose Drywall Services Ltd. (Respondent) (*Endorsed Settlement*)
- **3382-95-G:** Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Buttcon Limited (Respondent) (*Withdrawn*)
- **3422-95-G:** Labourers' International Union of North America, Local 837 (Applicant) v. G & G Masonry (Respondent) (*Granted*)
- **3453-95-G:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Thermo Systems Insulation Ltd. (Respondent) (*Withdrawn*)
- **3455-95-G:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 786 (Applicant) v. Roy Talevi's General Welding Inc. (Respondent) (*Withdrawn*)
- **3459-95-G:** United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. The Jackson-Lewis Co. Inc. (Respondent) (*Withdrawn*)
- **3480-95-G:** International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Canada Inc. (Respondent) (*Withdrawn*)
- **3494-95-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Canquip Crane & Equipment Rentals Inc. (Respondent) (*Endorsed Settlement*)
- **3495-95-G:** Construction Workers Local 53, CLAC (Applicant) v. Empire Roofing Corporation (Respondent) (*Withdrawn*)
- **3497-95-G:** International Brotherhood of Electrical Workers, Local 586 (Applicant) v. C & M Electric Ltd. (Respondent) (*Endorsed Settlement*)
- **3521-95-G:** Sheet Metal Workers' International Association, Local 269 (Applicant) v. Cupido Construction (1989) Ltd., Electrical Power Systems Construction Association (Respondents) (*Withdrawn*)
- **3531-95-G:** Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Scotsdale Masonry Contractors Ltd. (Respondent) (*Withdrawn*)
- **3533-95-G:** Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Active Contracting (1072573 Ontario Ltd.) (Respondent) (*Withdrawn*)
- **3536-95-G:** Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Krest Masonry Inc. (Respondent) (*Withdrawn*)
- **3572-95-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Sanvilla General Construction Ltd. (Respondent) (*Endorsed Settlement*)

- **3574-95-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Batoni Construction Inc. (Respondent) (*Endorsed Settlement*)
- 3576-95-G: International Union of Operating Engineers, Local 793 (Applicant) v. Pit-On Construction Company Limited (Respondent) (Endorsed Settlement)
- 3579-95-G: International Union of Operating Engineers, Local 793 (Applicant) v. Amico Contracting & Engineering (1992) Inc. (Respondent) (Withdrawn)
- **3592-95-G:** International Brotherhood of Painters and Allied Trades Local 1819 (Applicant) v. Harrison Glass & Mirror (Respondent) (*Endorsed Settlement*)
- 3597-95-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 759 (Applicant) v. Jet Welding & Ornamental Iron Works (Respondent) (Endorsed Settlement)
- **3601-95-G:** United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Deck Wall Forming (Respondent) (*Endorsed Settlement*)
- **3604-95-G:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Industrial Commercial Insulation Contr. (Sault) Ltd. (Respondent) (*Withdrawn*)
- **3627-95-G:** Labourers' International Union of North America, Local 1059 (Applicant) v. Strathroy Concrete Forming (1988) Inc. and Edward J. Baker (Respondents) (*Withdrawn*)
- **3635-95-G:** United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council (Applicant) v. Coldmatic Refrigeration of Canada Ltd. (Respondent) (*Endorsed Settlement*)
- **3645-95-G:** Sheet Metal Workers' International Association, Local Union No. 30 (Applicant) v. Lynx Air Systems Ltd. (Respondent) (*Withdrawn*)
- **3646-95-G:** Sheet Metal Workers' International Association, Local Union No. 30 (Applicant) v. Acura Sheet Metal Company Ltd. (Respondent) (*Endorsed Settlement*)
- **3661-95-G:** International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. C.S.E. Corporation c.o.b. Concept Systems Electric (Respondent) (*Withdrawn*)
- **3665-95-G:** International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Blackhawk Electrical and Mechanical Contractors Limited (Respondent) (*Withdrawn*)
- 3718-95-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Torchline Welding Corporation (Respondent) (Withdrawn)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

- **2990-95-R:** Labourers International Union of North America (Applicant) v. Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America; Canadian Union of Shinglers and Allied Workers; Metropolitan Toronto Shiglers Association c.o.b. as Canadian Shinglers Association; Canadian Shinglers Association; Robert Shewell; Harold Biso; Steven Wolfreys (Respondent) (*Dismissed*)
- 3308-95-R: United Steelworkers of America (Applicant) v. Sara Lee Bakery Canada (Respondent) (Denied)



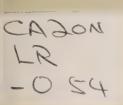




Ontario Labour Relations Board, 400 University Avenue, Toronto, Ontario M7A 1V4







ONTARIO LABOUR RELATIONS BOARD REPORTS

March/April 1996



ONTARIO LABOUR RELATIONS BOARD

Chair Alternate Chair Vice-Chair

R.O. MacDOWELL R.J. HERMAN C.J. ALBERTYN M. BENDEL J.B. BLOCH

J.B. BLOCH P. CHAPMAN L. DAVIE

N.V. DISSANAYAKE

D. GEE

R.G. GOODFELLOW

B. HERLICH D.L. HEWAT R.D. HOWE M.K. JOACHIM J. JOHNSTON B. KELLER P. KNOPF J. KOVACS S. LIANG G. MISRA M.A. NAIRN K. O'NEIL K. PETRYSHEN T. SARGEANT N.B. SATTERFIELD L. SHOULDICE I.M. STAMP R. STOYKEWYCH G. SURDYKOWSKI

Members

L. TRACHUK K. WHITAKER

K.S. BRENNAN
A.R. FOUCAULT
W.N. FRASER
P.V. GRASSO
V. HARRIS
J. IRVINE
J. KENNEDY
S. LAING
C. McDONALD
O.R. McGUIRE
G. McMENEMY
R.R. MONTAGUE
D.A. PATTERSON
H. PEACOCK

R.W. PIRRIE
F.B. REAUME
J. REDSHAW
J.A. RONSON
J.A. RUNDLE
D. RYAN
P. SEVILLE
R.M. SLOAN
M. SULLIVAN
J. TRIM

M. VUKOBRAT R. WEISS

W.H. WIGHTMAN D.G. WOZNIAK

Registrar Board Solicitors T.A. INNISS K. HESHKA R. LEBI

K.A. MacDONALD

ONTARIO LABOUR RELATIONS BOARD REPORTS

A Bimonthly Series of Decisions from the Ontario Labour Relations Board

Cited [1996] OLRB REP. MARCH/APRIL

EDITOR: RON LEBI

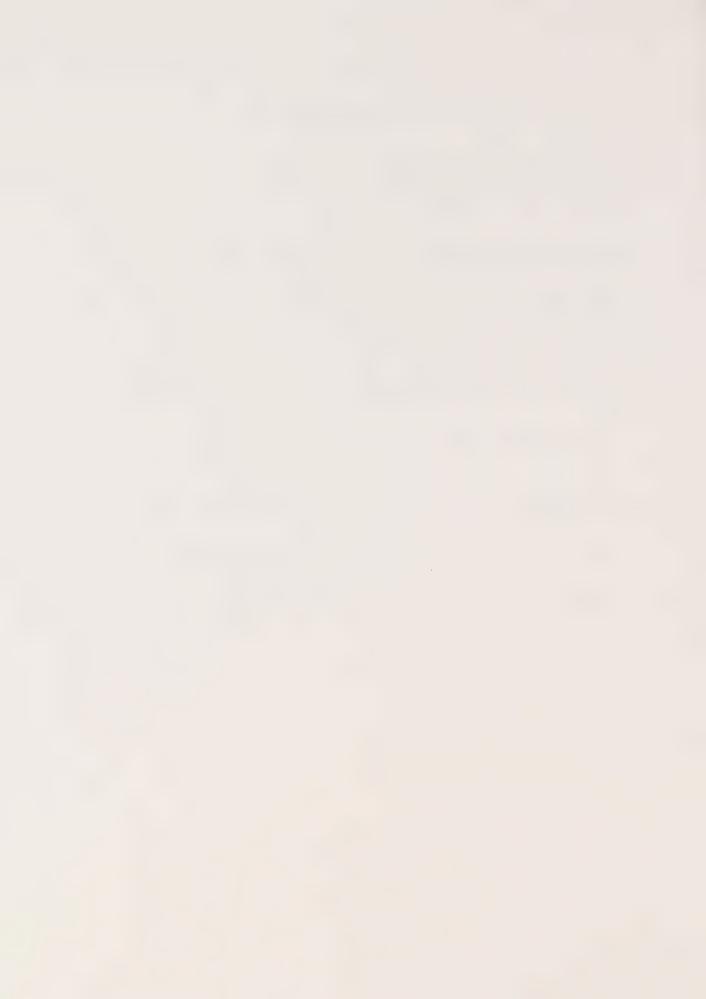
Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.





CASES REPORTED

1.	Asea Brown Boveri Inc., BBF, Locals 128 and 555; Re: BSOIW, Local 759	185
2.	Burns International Security Services Limited; Re USWA; Re UFCW, Local 333 (Canadian Security Union) and International United Plant Guard Workers of America Local 1956	
3.	Canadian Union of Shinglers & Allied Workers; Re Joe White, Hank Brouwers, Paul Cyr; Re Residential Roofing Contractors Association of Metropolitan Toronto et al	
4.	Delta Catalytic Industrial Services Limited; IBEW, Local 353; Re General President's Maintenance Committee for Canada, Petro-Canada	
5.	IBEW; Re IBEW, Local 1788	
6.	Jaddco Anderson Limited; Re IBEW, Local 105	249
7.	La Co-Operative de Pointe-Aux-Roches, 1015195 Ontario Limited and Charles Desmarais; Re UFCW, Local 278w, and CJA, Local 3054; Re United Co-Operative of Ontario and UCO Petroleum Inc.; Re Group of Employees	259
8.	Lionhead Golf & Country Club, Division of Kaneff Properties Limited; Re UFCW, Local 206 Chartered by the UFCW CLC, AFL-CIO	
9.	Management Board of Cabinet, the Crown in Right of Ontario, as represented by; Re OPSEU	284
10.	Maverick Mechanical Contractors Limited; Re Local Union 47 Sheet Metal Workers' International Association	289
11.	Ontario Public Services Employees Union; Re David E. Smith et al (see Schedule "B"); Re The Crown in Right of Ontario as represented by Management Board of Cabinet	297
12.	Shoppers Drug Mart, ASM Dispensaries Limited c.o.b. as; Re USWA; Re Group of Employees	303
13.	Tilbury Concrete Transport Inc. and Tilbury Concrete Inc.; Re Teamsters, Chauffeurs, Warehousemen and Helpers, Local 880; Re CUOE	321
14.	Thomson Newspapers Company Limited (Guelph Mercury Division); Re Southern Ontario Newspaper Guild Local 87, The Newspaper Guild	331



SUBJECT INDEX

Bargaining Unit - Certification - Union seeking to represent bargaining unit of food and beverage staff at golf club, and to exclude from unit pro shop staff and grounds maintenance employees - Board finding that golf club operating as integrated enterprise and that lines dividing work of the various group blurred - Union's proposed bargaining unit held not appropriate - Application withdrawn with leave of the Board
LIONHEAD GOLF & COUNTRY CLUB, DIVISION OF KANEFF PROPERTIES LIMITED; RE UFCW, LOCAL 206 CHARTERED BY THE UFCW CLC, AFL-CIO

Certification - Bargaining Unit - Union seeking to represent bargaining unit of food and beverage staff at golf club, and to exclude from unit pro shop staff and grounds maintenance employees - Board finding that golf club operating as integrated enterprise and that lines dividing work of the various group blurred - Union's proposed bargaining unit held not appropriate - Application withdrawn with leave of the Board

LIONHEAD GOLF & COUNTRY CLUB, DIVISION OF KANEFF PROPERTIES LIMITED; RE UFCW, LOCAL 206 CHARTERED BY THE UFCW CLC, AFL-CIO

Certification - Certification Where Act Contravened - Interference in Trade Unions - Intimidation and Coercion - Remedies - Unfair Labour Practice - After receiving copy of union's certification application, employer meeting with employees one-to-one and asking them to sign personalized declaration opposing trade union - Employer acting on legal advice and in belief that he was acting in compliance with Board's rules - Only one of five employees subsequently casting ballot in representation vote - Union losing vote - Board setting aside representation vote and directing new vote - Employer directed to cease and desist violating Act, to post decision and attached notice in workplace and to mail copy to each employee at home, and to provide union opportunity to address employees at meeting held during normal working hours - Union's application to be certified under section 11(1) of the Act dismissed

MAVERICK MECHANICAL CONTRACTORS LIMITED; RE LOCAL UNION 47 SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION.....

Certification - Certification Where Act Contravened - Interference in Trade Unions - Intimidation and Coercion - Reconsideration - Unfair Labour Practice - Board finding that employer removal of key inside union organizer from workplace and subsequent reassignment tainted by anti-union animus - Board also finding that various steps to increase managerial presence in workplace during organizing campaign coloured by anti-union motivation - Board certifying union under section 9.2 of "old" Labour Relations Act - Employer seeking reconsideration of decision on grounds that "bottom line" decision (without reasons) issued on November 10, 1995 was not "final" decision for purposes of transitional provisions of Bill 7 - Employer submitting that Board ought to have decided case under section 11(1) of "new" Labour Relations Act - Board noting that absence of reasons not undermining dispositive effect of "bottom line" decision and that Bill 7 requiring that "new" Act apply retroactively only where no final decision having issued on November 10, 1995 - Reconsideration application dismissed

SHOPPERS DRUG MART, ASM DISPENSARIES LIMITED C.O.B. AS; RE USWA; RE GROUP OF EMPLOYEES

Certification - Practice and Procedure - Representation Vote - Security Guards - Timeliness - USWA and CSU each filing application to displace UPGW as bargaining agent for security guard employees of employer - Board concluding that USWA's first application filed day before commencement of last two months of UPGW collective agreement's operation and,

271

271

289

303

therefore, untimely - USWA filing subsequent application on same day as CSU - Board distinguishing Carleton Board of Education case and exercising its discretion under section 111(3) of the Act to process the two applications together - Board finding that USWA and CSU each appearing to enjoy membership support of at least 40% in their proposed bargaining units - Board directing three-way representation vote - Board rejecting request to postpone vote until hearing into various "40% threshold" assertions or allegations concerning conflicts of interest resulting from applicant unions becoming certified - Board explaining its practice concerning how, when and on what information it determines that a representation vote should be ordered in certification applications

BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE USWA; RE UFCW, LOCAL 333 (CANADIAN SECURITY UNION) AND INTERNATIONAL UNITED PLANT GUARD WORKERS OF AMERICA LOCAL 1956.......

192

Certification Where Act Contravened - Certification - Interference in Trade Unions - Intimidation and Coercion - Remedies - Unfair Labour Practice - After receiving copy of union's certification application, employer meeting with employees one-to-one and asking them to sign personalized declaration opposing trade union - Employer acting on legal advice and in belief that he was acting in compliance with Board's rules - Only one of five employees subsequently casting ballot in representation vote - Union losing vote - Board setting aside representation vote and directing new vote - Employer directed to cease and desist violating Act, to post decision and attached notice in workplace and to mail copy to each employee at home, and to provide union opportunity to address employees at meeting held during normal working hours - Union's application to be certified under section 11(1) of the Act dismissed

MAVERICK MECHANICAL CONTRACTORS LIMITED; RE LOCAL UNION 47 SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION.....

289

Certification Where Act Contravened - Certification - Interference in Trade Unions - Intimidation and Coercion - Reconsideration - Unfair Labour Practice - Board finding that employer removal of key inside union organizer from workplace and subsequent reassignment tainted by anti-union animus - Board also finding that various steps to increase managerial presence in workplace during organizing campaign coloured by anti-union motivation - Board certifying union under section 9.2 of "old" Labour Relations Act - Employer seeking reconsideration of decision on grounds that "bottom line" decision (without reasons) issued on November 10, 1995 was not "final" decision for purposes of transitional provisions of Bill 7 - Employer submitting that Board ought to have decided case under section 11(1) of "new" Labour Relations Act - Board noting that absence of reasons not undermining dispositive effect of "bottom line" decision and that Bill 7 requiring that "new" Act apply retroactively only where no final decision having issued on November 10, 1995 - Reconsideration application dismissed

SHOPPERS DRUG MART, ASM DISPENSARIES LIMITED C.O.B. AS; RE USWA; RE GROUP OF EMPLOYEES.....

303

Construction Industry - Construction Industry Grievance - Practice and Procedure - Employer objecting to Board's consideration of grievance under ICI provincial agreement because subject matter had earlier been referred to and decided by panel of General Presidents' Maintenance Committee under terms of General Presidents' Maintenance Committee Project Agreements - Employer's objection upheld - Board terminating proceeding before it

DELTA CATALYTIC INDUSTRIAL SERVICES LIMITED; IBEW, LOCAL 353; RE GENERAL PRESIDENT'S MAINTENANCE COMMITTEE FOR CANADA, PETRO-CANADA

233

Construction Industry - Construction Industry Grievance - Parties - Practice and Procedure -

Union's grievance raising issue of whether work involved construction work or maintenance work - Union alleging that work covered by ICI agreement and employer asserting that work properly dealt with under terms of General Presidents' Maintenance Committee for Canada Project Agreement - General Presidents' Maintenance Committee for Canada ("GPC") and project owner each seeking to intervene in proceeding - Board concluding that neither project owner nor GPC entitled to standing as of right, but granting standing to GPC as matter of discretion - Project owner denied standing	
JADDCO ANDERSON LIMITED; RE IBEW, LOCAL 105	249
Construction Industry - Evidence - Practice and Procedure - Termination - Trade Union - Trade Union Status - Applicants seeking to terminate CUSAW's bargaining rights in connection with several roofing contractors working in residential sector of construction industry - After close of CUSAW's case, applicant moving to "nonsuit" CUSAW on ground that its own evidence failed to establish that it was a trade union within the meaning of the Act - Board explaining use of nonsuit motions and those akin to nonsuit motions in proceedings before it, and why Board considered applicant's motion without putting it to its election - Board concluding that CUSAW not an organization of employees, but rather an organization formed by, and operated for the benefit of, employers (that is, crew leaders) - Application to terminate bargaining rights allowed	
CANADIAN UNION OF SHINGLERS & ALLIED WORKERS; RE JOE WHITE, HANK BROUWERS, PAUL CYR; RE RESIDENTIAL ROOFING CONTRACTORS ASSOCIATION OF METROPOLITAN TORONTO ET AL	215
Construction Industry - Jurisdictional Dispute - Practice and Procedure - Ironworkers' union and Boilermakers' union disputing assignment of certain work - Boilermakers asking Board to refuse to entertain Ironworkers' application on basis that matter had already been decided under Plan for Settlement of Jurisdictional Disputes - Board considering effect of Bill 7 amendments to jurisdictional dispute provisions of the Act - Board exercising its discretion against inquiring further and dismissing Ironworkers' application	
ASEA BROWN BOVERI INC., BBF, LOCALS 128 AND 555; RE: BSOIW, LOCAL 759	185
Construction Industry Grievance - Construction Industry - Practice and Procedure - Employer objecting to Board's consideration of grievance under ICI provincial agreement because subject matter had earlier been referred to and decided by panel of General Presidents' Maintenance Committee under terms of General Presidents' Maintenance Committee Project Agreements - Employer's objection upheld - Board terminating proceeding before it	
DELTA CATALYTIC INDUSTRIAL SERVICES LIMITED; IBEW, LOCAL 353; RE GENERAL PRESIDENT'S MAINTENANCE COMMITTEE FOR CANADA, PETRO-CANADA	233
Construction Industry Grievance - Construction Industry - Parties - Practice and Procedure - Union's grievance raising issue of whether work involved construction work or maintenance work - Union alleging that work covered by ICI agreement and employer asserting that work properly dealt with under terms of General Presidents' Maintenance Committee for Canada Project Agreement - General Presidents' Maintenance Committee for Canada ("GPC") and project owner each seeking to intervene in proceeding - Board concluding that neither project owner nor GPC entitled to standing as of right, but granting standing to GPC as matter of discretion - Project owner denied standing	
JADDCO ANDERSON LIMITED; RE IBEW, LOCAL 105	249
Crown Employees Collective Bargaining Act - Essential Services Agreement - Management Board applying under Crown Employees Collective Bargaining Act to vary essential ser-	

vices order made 10 months earlier - Earlier order declaring that essential service work for meat inspectors during strike or lockout in OPSEU bargaining unit limited to monitoring meat processing operations to ensure that no illegal slaughter occurring - Management Board seeking order permitting limited inspection of meat processing operations or, alternatively, amendment to essential services agreement providing for more inspectors to monitor operations if slaughtering not to occur - Board declining to vary its earlier order or to amend essential services agreement, but parties directed to negotiate emergency services protocol of meat inspectors MANAGEMENT BOARD OF CABINET, THE CROWN IN RIGHT OF ONTARIO,

AS REPRESENTED BY; RE OPSEU.....

284

Employee - Employee Reference - Employer asking Board to exercise its discretion not to entertain union's application regarding "employee" status of newspaper's "weekend editor" -Employer asserting that union delayed in bringing application - Employer also asserting that no useful labour relations purpose would be served by determining issue of "employee" status because underlying issue would be resolved in employer's favour at arbitration dealing with question of inclusion/exclusion from bargaining unit - Board not accepting employer's assertions and authorizing Labour Relations Officer to inquire into weekend editor's duties and responsibilities

THOMSON NEWSPAPERS COMPANY LIMITED (GUELPH MERCURY DIVI-SION); RE SOUTHERN ONTARIO NEWSPAPER GUILD LOCAL 87, THE NEWS-PAPER GUILD

331

Employee Reference - Employee - Employer asking Board to exercise its discretion not to entertain union's application regarding "employee" status of newspaper's "weekend editor" -Employer asserting that union delayed in bringing application - Employer also asserting that no useful labour relations purpose would be served by determining issue of "employee" status because underlying issue would be resolved in employer's favour at arbitration dealing with question of inclusion/exclusion from bargaining unit - Board not accepting employer's assertions and authorizing Labour Relations Officer to inquire into weekend editor's duties and responsibilities

THOMSON NEWSPAPERS COMPANY LIMITED (GUELPH MERCURY DIVI-SION); RE SOUTHERN ONTARIO NEWSPAPER GUILD LOCAL 87, THE NEWS-PAPER GUILD

331

Essential Services Agreement - Crown Employees Collective Bargaining Act - Management Board applying under Crown Employees Collective Bargaining Act to vary essential services order made 10 months earlier - Earlier order declaring that essential service work for meat inspectors during strike or lockout in OPSEU bargaining unit limited to monitoring meat processing operations to ensure that no illegal slaughter occurring - Management Board seeking order permitting limited inspection of meat processing operations or, alternatively, amendment to essential services agreement providing for more inspectors to monitor operations if slaughtering not to occur - Board declining to vary its earlier order or to amend essential services agreement, but parties directed to negotiate emergency services protocol of meat inspectors

MANAGEMENT BOARD OF CABINET, THE CROWN IN RIGHT OF ONTARIO, AS REPRESENTED BY; RE OPSEU

284

Evidence - Construction Industry - Practice and Procedure - Termination - Trade Union - Trade Union Status - Applicants seeking to terminate CUSAW's bargaining rights in connection with several roofing contractors working in residential sector of construction industry -After close of CUSAW's case, applicant moving to "nonsuit" CUSAW on ground that its own evidence failed to establish that it was a trade union within the meaning of the Act -Board explaining use of nonsuit motions and those akin to nonsuit motions in proceedings

before it, and why Board considered applicant's motion without putting it to its election - Board concluding that CUSAW not an organization of employees, but rather an organization formed by, and operated for the benefit of, employers (that is, crew leaders) - Application to terminate bargaining rights allowed	
CANADIAN UNION OF SHINGLERS & ALLIED WORKERS; RE JOE WHITE, HANK BROUWERS, PAUL CYR; RE RESIDENTIAL ROOFING CONTRACTORS ASSOCIATION OF METROPOLITAN TORONTO ET AL	215
Interference in Trade Unions - Certification - Certification Where Act Contravened - Intimidation and Coercion - Remedies - Unfair Labour Practice - After receiving copy of union's certification application, employer meeting with employees one-to-one and asking them to sign personalized declaration opposing trade union - Employer acting on legal advice and in belief that he was acting in compliance with Board's rules - Only one of five employees subsequently casting ballot in representation vote - Union losing vote - Board setting aside representation vote and directing new vote - Employer directed to cease and desist violating Act, to post decision and attached notice in workplace and to mail copy to each employee at home, and to provide union opportunity to address employees at meeting held during normal working hours - Union's application to be certified under section 11(1) of the Act dismissed	
MAVERICK MECHANICAL CONTRACTORS LIMITED; RE LOCAL UNION 47 SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION	289
Interference in Trade Unions - Certification - Certification Where Act Contravened - Intimidation and Coercion - Reconsideration - Unfair Labour Practice - Board finding that employer removal of key inside union organizer from workplace and subsequent reassignment tainted by anti-union animus - Board also finding that various steps to increase managerial presence in workplace during organizing campaign coloured by anti-union motivation - Board certifying union under section 9.2 of "old" Labour Relations Act - Employer seeking reconsideration of decision on grounds that "bottom line" decision (without reasons) issued on November 10, 1995 was not "final" decision for purposes of transitional provisions of Bill 7 - Employer submitting that Board ought to have decided case under section 11(1) of "new" Labour Relations Act - Board noting that absence of reasons not undermining dispositive effect of "bottom line" decision and that Bill 7 requiring that "new" Act apply retroactively only where no final decision having issued on November 10, 1995 - Reconsideration application dismissed	
SHOPPERS DRUG MART, ASM DISPENSARIES LIMITED C.O.B. AS; RE USWA; RE GROUP OF EMPLOYEES	303
Interim Relief - Remedies - Trusteeship - International union seeking to extend trusteeship over local beyond 12 month period - Application to extend trusteeship filed 12 days before statutory expiry of trusteeship - International union asking to extend trusteeship on interim basis pending disposition of main request - Request for interim extension of trusteeship dismissed - International directed to forward notices and copies of Board's decision to all members of local	
IBEW; RE IBEW, LOCAL 1788	244
Intimidation and Coercion - Certification - Certification Where Act Contravened - Interference in Trade Unions - Remedies - Unfair Labour Practice - After receiving copy of union's certification application, employer meeting with employees one-to-one and asking them to sign personalized declaration opposing trade union - Employer acting on legal advice and in	

personalized declaration opposing trade union - Employer acting on legal advice and in belief that he was acting in compliance with Board's rules - Only one of five employees subsequently casting ballot in representation vote - Union losing vote - Board setting aside representation vote and directing new vote - Employer directed to cease and desist violating Act, to post decision and attached notice in workplace and to mail copy to each employee

at home, and to provide union opportunity to address employees at meeting held during normal working hours - Union's application to be certified under section 11(1) of the Act dismissed MAVERICK MECHANICAL CONTRACTORS LIMITED: RE LOCAL UNION 47 SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION..... 289 Intimidation and Coercion - Certification - Certification Where Act Contravened - Interference in Trade Unions - Reconsideration - Unfair Labour Practice - Board finding that employer removal of key inside union organizer from workplace and subsequent reassignment tainted by anti-union animus - Board also finding that various steps to increase managerial presence in workplace during organizing campaign coloured by anti-union motivation - Board certifying union under section 9.2 of "old" Labour Relations Act - Employer seeking reconsideration of decision on grounds that "bottom line" decision (without reasons) issued on November 10, 1995 was not "final" decision for purposes of transitional provisions of Bill 7 - Employer submitting that Board ought to have decided case under section 11(1) of "new" Labour Relations Act - Board noting that absence of reasons not undermining dispositive effect of "bottom line" decision and that Bill 7 requiring that "new" Act apply retroactively only where no final decision having issued on November 10, 1995 - Reconsideration application dismissed SHOPPERS DRUG MART, ASM DISPENSARIES LIMITED C.O.B. AS: RE USWA: RE GROUP OF EMPLOYEES 303 Jurisdictional Dispute - Construction Industry - Practice and Procedure - Ironworkers' union and Boilermakers' union disputing assignment of certain work - Boilermakers asking Board to refuse to entertain Ironworkers' application on basis that matter had already been decided under Plan for Settlement of Jurisdictional Disputes - Board considering effect of Bill 7 amendments to jurisdictional dispute provisions of the Act - Board exercising its discretion against inquiring further and dismissing Ironworkers' application ASEA BROWN BOVERI INC., BBF, LOCALS 128 AND 555; RE: BSOIW, LOCAL 759..... 185 Parties - Construction Industry - Construction Industry Grievance - Practice and Procedure -Union's grievance raising issue of whether work involved construction work or maintenance work - Union alleging that work covered by ICI agreement and employer asserting that work properly dealt with under terms of General Presidents' Maintenance Committee for Canada Project Agreement - General Presidents' Maintenance Committee for Canada ("GPC") and project owner each seeking to intervene in proceeding - Board concluding that neither project owner nor GPC entitled to standing as of right, but granting standing to GPC as matter of discretion - Project owner denied standing JADDCO ANDERSON LIMITED; RE IBEW, LOCAL 105..... 249

Practice and Procedure - Certification - Representation Vote - Security Guards - Timeliness - USWA and CSU each filing application to displace UPGW as bargaining agent for security guard employees of employer - Board concluding that USWA's first application filed day before commencement of last two months of UPGW collective agreement's operation and, therefore, untimely - USWA filing subsequent application on same day as CSU - Board distinguishing Carleton Board of Education case and exercising its discretion under section 111(3) of the Act to process the two applications together - Board finding that USWA and CSU each appearing to enjoy membership support of at least 40% in their proposed bargaining units - Board directing three-way representation vote - Board rejecting request to postpone vote until hearing into various "40% threshold" assertions or allegations concerning conflicts of interest resulting from applicant unions becoming certified - Board explain-

	its practice concerning how, when and on what information it determines that a repre- tation vote should be ordered in certification applications	
UF	RNS INTERNATIONAL SECURITY SERVICES LIMITED; RE USWA; RECW, LOCAL 333 (CANADIAN SECURITY UNION) AND INTERNATIONAL INTERPRETATIONAL GRANT GUARD WORKERS OF AMERICA LOCAL 1956	192
obje sub Mai	and Procedure - Construction Industry - Construction Industry Grievance - Employer ecting to Board's consideration of grievance under ICI provincial agreement because eject matter had earlier been referred to and decided by panel of General Presidents' intenance Committee under terms of General Presidents' Maintenance Committee eject Agreements - Employer's objection upheld - Board terminating proceeding before	
GE	ELTA CATALYTIC INDUSTRIAL SERVICES LIMITED; IBEW, LOCAL 353; REENERAL PRESIDENT'S MAINTENANCE COMMITTEE FOR CANADA, TRO-CANADA	233
Uni wor wor Car ("C	and Procedure - Construction Industry - Construction Industry Grievance - Parties - tion's grievance raising issue of whether work involved construction work or maintenance rk - Union alleging that work covered by ICI agreement and employer asserting that rk properly dealt with under terms of General Presidents' Maintenance Committee for nada Project Agreement - General Presidents' Maintenance Committee for Canada GPC") and project owner each seeking to intervene in proceeding - Board concluding at neither project owner nor GPC entitled to standing as of right, but granting standing to PC as matter of discretion - Project owner denied standing	
JA	DDCO ANDERSON LIMITED; RE IBEW, LOCAL 105	249
Un wit Aft own Boo bef	and Procedure - Construction Industry - Evidence - Termination - Trade Union - Trade nion Status - Applicants seeking to terminate CUSAW's bargaining rights in connection the several roofing contractors working in residential sector of construction industry - ter close of CUSAW's case, applicant moving to "nonsuit" CUSAW on ground that its remediate to establish that it was a trade union within the meaning of the Act - pard explaining use of nonsuit motions and those akin to nonsuit motions in proceedings fore it, and why Board considered applicant's motion without putting it to its election - pard concluding that CUSAW not an organization of employees, but rather an organization formed by, and operated for the benefit of, employers (that is, crew leaders) - Application to terminate bargaining rights allowed	
HA	ANADIAN UNION OF SHINGLERS & ALLIED WORKERS; RE JOE WHITE, ANK BROUWERS, PAUL CYR; RE RESIDENTIAL ROOFING CONTRACTORS SSOCIATION OF METROPOLITAN TORONTO ET AL	215
Bo ref unc am aga	and Procedure - Construction Industry - Jurisdictional Dispute - Ironworkers' union and bilermakers' union disputing assignment of certain work - Boilermakers asking Board to fuse to entertain Ironworkers' application on basis that matter had already been decided der Plan for Settlement of Jurisdictional Disputes - Board considering effect of Bill 7 mendments to jurisdictional dispute provisions of the Act - Board exercising its discretion ainst inquiring further and dismissing Ironworkers' application	
AS 759	SEA BROWN BOVERI INC., BBF, LOCALS 128 AND 555; RE: BSOIW, LOCAL	185
str	tion and Strike Vote - Strike - Unfair Labour Practice - Employees alleging that rike/ratification vote organized by OPSEU for 65,000 employees of Government of intario employed at 4000 work sites across province not satisfying new statutory requirements - Board satisfied that voting arrangements made by OPSEU, particularly times and	

places scheduled for voting, affording employees ample opportunity to cast ballots and reasonably convenient in all the circumstances - Application dismissed	
ONTARIO PUBLIC SERVICES EMPLOYEES UNION; RE DAVID E. SMITH ET AL (SEE SCHEDULE "B"); RE THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY MANAGEMENT BOARD OF CABINET	297
Reconsideration - Certification - Certification Where Act Contravened - Interference in Trade Unions - Intimidation and Coercion - Unfair Labour Practice - Board finding that employer removal of key inside union organizer from workplace and subsequent reassignment tainted by anti-union animus - Board also finding that various steps to increase managerial presence in workplace during organizing campaign coloured by anti-union motivation - Board certifying union under section 9.2 of "old" Labour Relations Act - Employer seeking reconsideration of decision on grounds that "bottom line" decision (without reasons) issued on November 10, 1995 was not "final" decision for purposes of transitional provisions of Bill 7 - Employer submitting that Board ought to have decided case under section 11(1) of "new" Labour Relations Act - Board noting that absence of reasons not undermining dispositive effect of "bottom line" decision and that Bill 7 requiring that "new" Act apply retroactively only where no final decision having issued on November 10, 1995 - Reconsideration application dismissed	
RE GROUP OF EMPLOYEES	303
Related Employer - Remedies - Teamsters certified to represent drivers employed by Company "A" in January 1995 - CUOE certified to represent drivers of Company "B" in April 1995 - Company "B" employing drivers for first time in March or April - Teamsters asserting and Board finding that Companies "A" and "B" related employers - CUOE filing intervention but not otherwise participating in proceeding or defending its bargaining rights - Board declaring Companies "A" and "B" to be related employers and that CUOE no longer representing employees of Company "B"	
TILBURY CONCRETE TRANSPORT INC. AND TILBURY CONCRETE INC.; RE TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 880; RE CUOE	321
Remedies - Certification - Certification Where Act Contravened - Interference in Trade Unions - Intimidation and Coercion - Unfair Labour Practice - After receiving copy of union's certification application, employer meeting with employees one-to-one and asking them to sign personalized declaration opposing trade union - Employer acting on legal advice and in belief that he was acting in compliance with Board's rules - Only one of five employees subsequently casting ballot in representation vote - Union losing vote - Board setting aside representation vote and directing new vote - Employer directed to cease and desist violating Act, to post decision and attached notice in workplace and to mail copy to each employee at home, and to provide union opportunity to address employees at meeting held during normal working hours - Union's application to be certified under section 11(1) of the Act dismissed	
MAVERICK MECHANICAL CONTRACTORS LIMITED; RE LOCAL UNION 47 SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION	289
Remedies - Interim Relief - Trusteeship - International union seeking to extend trusteeship over local beyond 12 month period - Application to extend trusteeship filed 12 days before statutory expiry of trusteeship - International union asking to extend trusteeship on interim basis pending disposition of main request - Request for interim extension of trusteeship dismissed - International directed to forward notices and copies of Board's decision to all members of local	
IBEW; RE IBEW, LOCAL 1788	244

Remedies - Related Employer - Teamsters certified to represent drivers employed by Company "A" in January 1995 - CUOE certified to represent drivers of Company "B" in April 1995 - Company "B" employing drivers for first time in March or April - Teamsters asserting and Board finding that Companies "A" and "B" related employers - CUOE filing intervention but not otherwise participating in proceeding or defending its bargaining rights - Board declaring Companies "A" and "B" to be related employers and that CUOE no longer representing employees of Company "B"

TILBURY CONCRETE TRANSPORT INC. AND TILBURY CONCRETE INC.; RE TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 880; RE CUOE.....

321

Representation Vote - Certification - Practice and Procedure - Security Guards - Timeliness - USWA and CSU each filing application to displace UPGW as bargaining agent for security guard employees of employer - Board concluding that USWA's first application filed day before commencement of last two months of UPGW collective agreement's operation and, therefore, untimely - USWA filing subsequent application on same day as CSU - Board distinguishing Carleton Board of Education case and exercising its discretion under section 111(3) of the Act to process the two applications together - Board finding that USWA and CSU each appearing to enjoy membership support of at least 40% in their proposed bargaining units - Board directing three-way representation vote - Board rejecting request to postpone vote until hearing into various "40% threshold" assertions or allegations concerning conflicts of interest resulting from applicant unions becoming certified - Board explaining its practice concerning how, when and on what information it determines that a representation vote should be ordered in certification applications

BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE USWA; RE UFCW, LOCAL 333 (CANADIAN SECURITY UNION) AND INTERNATIONAL UNITED PLANT GUARD WORKERS OF AMERICA LOCAL 1956.....

192

Sale of a Business - Co-op engaged in business of supplying farm inputs and services and in merchandising grain acquiring certain other unionized operations in series of transactions - Employer making sale of a business application and asking Board to rationalize (and potentially eliminate) its collective bargaining obligations - Parties disputing whether employees intermingled - Board assuming but not finding intermingling and concluding that such intermingling not of the "thorough" nature that would lead Board to intervene - Board noting that current bargaining structures not ideal but still viable - Employer's application under section 64(6) of the Act dismissed

LA CO-OPERATIVE DE POINTE-AUX-ROCHES, 1015195 ONTARIO LIMITED AND CHARLES DESMARAIS; RE UFCW, LOCAL 278W, AND CJA, LOCAL 3054; RE UNITED CO-OPERATIVE OF ONTARIO AND UCO PETROLEUM INC.; RE GROUP OF EMPLOYEES.....

259

Security Guards - Certification - Practice and Procedure - Representation Vote - Timeliness - USWA and CSU each filing application to displace UPGW as bargaining agent for security guard employees of employer - Board concluding that USWA's first application filed day before commencement of last two months of UPGW collective agreement's operation and, therefore, untimely - USWA filing subsequent application on same day as CSU - Board distinguishing Carleton Board of Education case and exercising its discretion under section 111(3) of the Act to process the two applications together - Board finding that USWA and CSU each appearing to enjoy membership support of at least 40% in their proposed bargaining units - Board directing three-way representation vote - Board rejecting request to postpone vote until hearing into various "40% threshold" assertions or allegations concerning conflicts of interest resulting from applicant unions becoming certified - Board explain-

ing its practice concerning how, when and on what information it determines that a representation vote should be ordered in certification applications BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE USWA; RE UFCW, LOCAL 333 (CANADIAN SECURITY UNION) AND INTERNATIONAL UNITED PLANT GUARD WORKERS OF AMERICA LOCAL 1956..... 192 Strike - Ratification and Strike Vote - Unfair Labour Practice - Employees alleging that strike/ratification vote organized by OPSEU for 65,000 employees of Government of Ontario employed at 4000 work sites across province not satisfying new statutory requirements - Board satisfied that voting arrangements made by OPSEU, particularly times and places scheduled for voting, affording employees ample opportunity to cast ballots and reasonably convenient in all the circumstances - Application dismissed ONTARIO PUBLIC SERVICES EMPLOYEES UNION; RE DAVID E. SMITH ET AL (SEE SCHEDULE "B"); RE THE CROWN IN RIGHT OF ONTARIO AS REPRE-SENTED BY MANAGEMENT BOARD OF CABINET 297 Termination - Construction Industry - Evidence - Practice and Procedure - Trade Union - Trade Union Status - Applicants seeking to terminate CUSAW's bargaining rights in connection with several roofing contractors working in residential sector of construction industry -·After close of CUSAW's case, applicant moving to "nonsuit" CUSAW on ground that its own evidence failed to establish that it was a trade union within the meaning of the Act -Board explaining use of nonsuit motions and those akin to nonsuit motions in proceedings before it, and why Board considered applicant's motion without putting it to its election -Board concluding that CUSAW not an organization of employees, but rather an organization formed by, and operated for the benefit of, employers (that is, crew leaders) - Application to terminate bargaining rights allowed CANADIAN UNION OF SHINGLERS & ALLIED WORKERS; RE JOE WHITE. HANK BROUWERS, PAUL CYR: RE RESIDENTIAL ROOFING CONTRACTORS ASSOCIATION OF METROPOLITAN TORONTO ET AL 215 Timeliness - Certification - Practice and Procedure - Representation Vote - Security Guards -USWA and CSU each filing application to displace UPGW as bargaining agent for security guard employees of employer - Board concluding that USWA's first application filed day before commencement of last two months of UPGW collective agreement's operation and, therefore, untimely - USWA filing subsequent application on same day as CSU - Board distinguishing Carleton Board of Education case and exercising its discretion under section 111(3) of the Act to process the two applications together - Board finding that USWA and CSU each appearing to enjoy membership support of at least 40% in their proposed bargaining units - Board directing three-way representation vote - Board rejecting request to postpone vote until hearing into various "40% threshold" assertions or allegations concerning conflicts of interest resulting from applicant unions becoming certified - Board explaining its practice concerning how, when and on what information it determines that a representation vote should be ordered in certification applications BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE USWA; RE UFCW, LOCAL 333 (CANADIAN SECURITY UNION) AND INTERNATIONAL

Trade Union - Construction Industry - Evidence - Practice and Procedure - Termination - Trade Union Status - Applicants seeking to terminate CUSAW's bargaining rights in connection with several roofing contractors working in residential sector of construction industry - After close of CUSAW's case, applicant moving to "nonsuit" CUSAW on ground that its own evidence failed to establish that it was a trade union within the meaning of the Act - Board explaining use of nonsuit motions and those akin to nonsuit motions in proceedings before it, and why Board considered applicant's motion without putting it to its election -

UNITED PLANT GUARD WORKERS OF AMERICA LOCAL 1956.....

192

	Board concluding that CUSAW not an organization of employees, but rather an organization formed by, and operated for the benefit of, employers (that is, crew leaders) - Application to terminate bargaining rights allowed	
	CANADIAN UNION OF SHINGLERS & ALLIED WORKERS; RE JOE WHITE, HANK BROUWERS, PAUL CYR; RE RESIDENTIAL ROOFING CONTRACTORS ASSOCIATION OF METROPOLITAN TORONTO ET AL	215
Trade	e Union Status - Construction Industry - Evidence - Practice and Procedure - Termination - Trade Union - Applicants seeking to terminate CUSAW's bargaining rights in connection with several roofing contractors working in residential sector of construction industry - After close of CUSAW's case, applicant moving to "nonsuit" CUSAW on ground that its own evidence failed to establish that it was a trade union within the meaning of the Act - Board explaining use of nonsuit motions and those akin to nonsuit motions in proceedings before it, and why Board considered applicant's motion without putting it to its election - Board concluding that CUSAW not an organization of employees, but rather an organization formed by, and operated for the benefit of, employers (that is, crew leaders) - Application to terminate bargaining rights allowed	
	CANADIAN UNION OF SHINGLERS & ALLIED WORKERS; RE JOE WHITE, HANK BROUWERS, PAUL CYR; RE RESIDENTIAL ROOFING CONTRACTORS ASSOCIATION OF METROPOLITAN TORONTO ET AL	215
Trust	local beyond 12 month period - Application to extend trusteeship filed 12 days before statutory expiry of trusteeship - International union asking to extend trusteeship on interim basis pending disposition of main request - Request for interim extension of trusteeship dismissed - International directed to forward notices and copies of Board's decision to all members of local	
	IBEW; RE IBEW, LOCAL 1788	244
Unfai	ir Labour Practice - Certification - Certification Where Act Contravened - Interference in Trade Unions - Intimidation and Coercion - Remedies - After receiving copy of union's certification application, employer meeting with employees one-to-one and asking them to sign personalized declaration opposing trade union - Employer acting on legal advice and in belief that he was acting in compliance with Board's rules - Only one of five employees subsequently casting ballot in representation vote - Union losing vote - Board setting aside representation vote and directing new vote - Employer directed to cease and desist violating Act, to post decision and attached notice in workplace and to mail copy to each employee at home, and to provide union opportunity to address employees at meeting held during normal working hours - Union's application to be certified under section 11(1) of the Act dismissed	
	MAVERICK MECHANICAL CONTRACTORS LIMITED; RE LOCAL UNION 47 SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION	289
Unfa	Trade Unions - Intimidation and Coercion - Reconsideration - Board finding that employer removal of key inside union organizer from workplace and subsequent reassignment tainted by anti-union animus - Board also finding that various steps to increase managerial presence in workplace during organizing campaign coloured by anti-union motivation - Board certifying union under section 9.2 of "old" Labour Relations Act - Employer seeking reconsideration of decision on grounds that "bottom line" decision (without reasons) issued on November 10, 1995 was not "final" decision for purposes of transitional provisions of Bill 7 - Employer submitting that Board ought to have decided case under section 11(1) of "new" Labour Relations Act - Board noting that absence of reasons not undermining dispositive effect of "bottom line" decision and that Bill 7 requiring that "new" Act apply	

	retroactively only where no final decision having issued on November 10, 1995 - Reconsideration application dismissed
303	SHOPPERS DRUG MART, ASM DISPENSARIES LIMITED C.O.B. AS; RE USWA; RE GROUP OF EMPLOYEES
	Unfair Labour Practice - Ratification and Strike Vote - Strike - Employees alleging that strike/ratification vote organized by OPSEU for 65,000 employees of Government of Ontario employed at 4000 work sites across province not satisfying new statutory requirements - Board satisfied that voting arrangements made by OPSEU, particularly times and places scheduled for voting, affording employees ample opportunity to cast ballots and reasonably convenient in all the circumstances - Application dismissed
297	ONTARIO PUBLIC SERVICES EMPLOYEES UNION; RE DAVID E. SMITH ET AL (SEE SCHEDULE "B"); RE THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY MANAGEMENT BOARD OF CABINET

0575-95-JD Iron Workers District Council of Ontario International Association of Bridge, Structural and Ornamental Iron Workers, Local 759, Applicant v. Asea Brown Boveri Inc., International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Locals 128 and 555, Responding Parties

Construction Industry - Jurisdictional Dispute - Practice and Procedure - Ironworkers' union and Boilermakers' union disputing assignment of certain work - Boilermakers asking Board to refuse to entertain Ironworkers' application on basis that matter had already been decided under Plan for Settlement of Jurisdictional Disputes - Board considering effect of Bill 7 amendments to jurisdictional dispute provisions of the Act - Board exercising its discretion against inquiring further and dismissing Ironworkers' application

BEFORE: Jules B. Bloch, Vice-Chair, and Board Members W. N. Fraser and J. Redshaw.

APPEARANCES: Gary Caroline and Larry Baillie for the applicant; Carl Peterson for Asea Brown Boveri; Michael A. Church and Steve Silversides for Boilermakers Local 128.

DECISION OF THE BOARD; April 22, 1996

- 1. This application concerns a complaint respecting an assignment of work. Pursuant to section 93 (now section 99) of the *Labour Relations Act*, the Board scheduled a consultation.
- 2. At the beginning of the consultation, the responding party International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Locals 128 and 555 ("Boilermakers") raised a preliminary objection requesting that the Board refuse to entertain the jurisdictional complaint raised by the applicant Iron Workers District Council of Ontario International Association of Bridge, Structural and Ornamental Iron Workers, Local 759 ("Ironworkers"). The Boilermakers asserted that this matter had been decided under the Plan for Settlement of Jurisdictional Disputes ("the Plan") in which all parties participated and in which a final decision had been rendered.
- 3. The parties referred the Board to section 91 (13) and (14) of the *Labour Relations Act*, R.S.O. 1990, c. L.2:
 - 91 (13) Where a trade union or a council of trade unions and an employer or an employers' organization have made an arrangement to resolve any differences between them arising from the assignment of work, the Board may, upon such terms and conditions as it may fix, postpone inquiring into a complaint under this section until the difference has been dealt with in accordance with such arrangement.
 - (14) The Board shall not inquire into a complaint made by a trade union, council of trade unions, employer or employers' organization that has entered into a collective agreement that contains a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement, and the trade union, council of trade unions, employer or employers' organization shall do or abstain from doing anything required of it by the decision of the tribunal.
- 4. The parties also referred the Board to section 93 (13) of the *Labour Relations Act*, R.S.O. 1990, c. L.2., as am. by S.O. 1992, c. 21:
 - 93.- (13) Where a trade union or a council of trade unions and an employer or an employers' organization have made an arrangement to resolve any differences between them arising from

the assignment of work, the Board may, upon such terms and conditions as it may fix, postpone inquiring into a complaint under this section until the difference has been dealt with in accordance with such arrangement.

5. The parties referred to article 6 of the Collective Agreement between the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (A.F.L.-C.I.O.-C.F.L.) and The Boilermaker Contractors' Association, Master Portion effective October 20, 1992 to June 30, 1995 ("Boilermakers Agreement") which reads, in part, as follows:

ARTICLE 6:00 - JURISDICTIONAL DISPUTES

6.01

- (a) It is incumbent on all Contractors and Subcontractors to assign work in accordance with Contractors responsibility set forth in procedural rules and regulations for the plan for settlement of Jurisdictional Disputes in the construction industry (June 1984 edition or as amended).
- (b) The Union shall utilize the procedural rules and regulations for the Plan for the settlement of Jurisdictional Disputes in the construction industry to the extent that it is sanctioned by the International Union.
- (c) Subject to the above provisions, it is understood and agreed that jurisdictional disputes shall not be the subject of a grievance under this agreement, but shall be dealt with as provided herein.

6.02

Should an alternative Jurisdictional Disputes Tribunal acceptable to the Union and the Boilermaker Contractors' Association be established during the life of this agreement such tribunal shall be utilized in place of the above mentioned Plan.

6.03

When a jurisdictional dispute exists between unions and upon request by the Union, the Employer shall furnish the International Offices of the Union, a signed letter on Employer stationery, stating that Boilermakers were employed on specific types of work on a given project.

6. The parties also referred to article 19 of the Collective Agreement between Ontario Erectors Association, Incorporated and The Ontario Erectors Association and The International Association of Bridge, Structural and Ornamental Ironworkers and the Ironworkers District Council of Ontario comprised of Local Unions 700, 721, 736, 759, 765 and 786, ("Ironworkers' Agreement") which reads, in part, as follows:

ARTICLE 19 — JURISDICTIONAL DISPUTES

- 19.1 Any jurisdictional dispute between the Union and any other building and construction trades union, that involved any work undertaken by an Employer, will in no way interfere with the progress and prosecution of the work. The parties agree to abide by a decision of the Impartial Jurisdictional Disputes Board and/or the Ontario Labour Relations Board.
- 19.2 A prejob conference shall be convened at the request of either party.
- 7. On November 10, 1995 the Labour Relations Act, 1995 came into force. By virtue of section 3 of the Labour Relations Act and Employment Statute Law Amendment Act, 1995 proceedings such as this one in which no final decision issued on or before the coming into force of the

Labour Relations Act, 1995 are to be decided under the provisions of the Labour Relations Act, 1995.

8. The parties were requested for their submissions in respect of the fact that section 99 of the *Labour Relations Act*, 1995 no longer includes a section similar to section 93(13) of the *Labour Relations Act*, R.S.O. c.L.2, as am. by S.O. 1992, c.21. The parties made additional submissions in respect of this point. The parties rely on section 99(3), 99(5) and 99(8) reproduced below:

99. • • •

(3) The Board is not required to hold a hearing to determine a complaint under this section.

• • •

(5) The Board may make any interim or final order it considers appropriate after consulting with the parties.

. . .

- (8) If a collective agreement requires the reference of any difference between the parties arising out of work assignment to a tribunal mutually selected by them, the Board may alter the bargaining unit determined in a certificate or defined in a collective agreement as it considers proper to enable the parties to conform to the decision of the tribunal.
- 9. The parties referred to the following decisions:

Construction Association of Thunder Bay Inc., [1987] OLRB Rep. July 976

Stoney Creek Mechanical Limited, [1984] OLRB Rep. Dec. 1917

Copper Cliff Mechanical Contractors Ltd., [1988] OLRB Rep. June 565

Groff & Associates Ltd., [1994] OLRB Rep. July 846

Boise Cascade Canada Ltd., [1992] OLRB Rep. Feb. 127

Saskatchewan Wheat Pool (1991), 22 LAC (4th) 129 (Solomatenko)

Canadian Airlines International Ltd. (1993), 32 LAC (4th) 359 (H.D. Brown)

Valdi Inc., [1980] OLRB Rep. Aug. 1254

Cuddy Food Products Ltd., [1988] OLRB Rep. Aug. 768

The General Hospital of Port Arthur, [1986] OLRB Rep. Sept. 1218

Canadian Johns - Manville Company Limited, [1974] OLRB Rep. Jan. 2

Electrical Power Systems Construction Association, [1992] OLRB Rep. Aug. 915

McIntosh Limousine Service Ltd., Air Cab Limousine Services (1985) Ltd., Aaroport Limousine Services Ltd. and Mr. Y. Zahavy, decision dated August 8, 1994, unreported

Asea Brown Boveri Inc., November 15, 1994 (unreported)

Rasanen v. Rosemount Instruments Limited, C.A. (1994) 17 O.R. (3d) 267 (Morden)

Ontario Hydro, [1993] OLRB Rep. May 442

Losereit Sales and Services Ltd., [1983] OLRB Rep. July 1090

John Craven, [1991] OLRB Rep. Aug. 969

Calorific Construction Limited, [1988] OLRB Rep. Feb. 115

Sheafer-Townsend Construction Limited, [1981] OLRB Rep. Nov. 1620

Schindler Elevator Corporation, [1990] OLRB Rep. Oct. 1092

Oakwood Park Lodge, [1980] OLRB Rep. Oct. 1501

Angle v. Minister of National Revenue (1974) 47 D.L.R. (3d) 544 (Spence)

Tandy Electronics Ltd. and United Steelworkers of America et al 1980 30 O.R. (2d) 29 (Van Camp)

Phil Benson and Labourers' International Union of North America and Stratt Crossing Inc. and The International Association of Bridge, Structural and Ornamental Ironworkers, [1955] P.E.I.J. No. 78 (QL)

Unless otherwise indicated the Board is referring to the sections as found in the *Labour Relations Act*, 1995.

- 10. The Board does not regard it as necessary to set out separately the submissions of the parties in great detail. The Board has carefully considered the parties' representations and the relevant jurisprudence in reaching its decision.
- In our view the issue before the Board is the Board's role in supervising other Jurisdictional Dispute processes. It is clear that prior to the enactment of Bill 40, the Board interpreted what was then section 91(14) of the *Labour Relations Act*, R.S.O. c. L.2 in a very strict manner. Indeed, even when the Washington plan (a Jurisdictional Dispute process based in Washington) was not making decisions the Board held that 91(14) of the *Labour Relations Act*, R.S.O. c. L.2 precluded it from assuming jurisdiction. (see: *Stoney Creek Mechanical Limited*, *supra*; and *Copper Cliff Mechanical Contractors Ltd.*, *supra*).
- 12. The repeal of section 91(14) of the Act in 1993 together with the repeal of subsection 93(13) of the Act in 1995 does not mean that the Board can or should no longer defer to other Jurisdictional Disputes resolution mechanisms. The legislative history does not suggest a restriction on the Board's discretion in Jurisdictional Disputes. The Board is satisfied that the Legislature intended with the passage of Bill 7 and the new provisions, to continue to have a significant discretion in dealing with work assignment disputes. It is impossible to read section 99(5) in any other manner. Section 99(8) does not restrict this discretion; it merely gives explicit authority for particular remedial relief. It also reflects the possibility that the parties, and the Board, will continue to sanction other mechanisms for dealing with Jurisdictional Disputes.

- 13. The case before us involves the same work that was the subject of a September 29, 1994 Plan Arbitration. An Arbitrator under the Plan held that:
 - (1) The Arbitrator had jurisdiction to hear the dispute.
 - (2) The Arbitrator awarded the Bark Fuel System and the Sludge Fuel System to the Ironworkers.
 - (3) The Arbitrator awarded the Combustor and the Day Bin to the Boilermakers because he found that the work was Boilermakers work as described in the 1928 Agreement of Record.
 - (4) The Arbitrator did not make an award in respect of the installation of the Fans because under the rules of the Plan completed work can not be the subject of a work assignment dispute.
- 14. The parties agreed that we have a discretion with respect to supervising parties' arrangements to resolve differences arising from the assignment of work. The parties also agreed that we should not inquire into the issue of the installation of the fans if that is the only part of the work assignment dispute that we would be prepared to adjudicate upon.
- 15. The parties agreed that the Ironworkers International, the Boilermakers International and Asea Brown Boveri Inc. ("A.B.B.") were stipulated to the Plan. (See *Phil Benson*, *supra*). The Ironworkers Local 759 however (the applicant) asserts that it is not stipulated to the Plan and therefore that arbitrators under the Plan do not have the jurisdiction to make findings against Local 759.
- 16. Further Local 759 assert that even if an arbitrator appointed under the Plan has jurisdiction to make findings against Local 759, this Board should intervene because of the unfairness of the system. The Local 759 argues that it was not allowed to participate directly in the arbitration, and had to participate through its International. Plan Arbitrators, in the Local 759's view, do not have the authority to order production of documents. Local 759 submits that the losing party, under the Jurisdictional Dispute Plan, is responsible for paying the Arbitrator's fees and expenses. Further Local 759 submits, the arbitrator is hampered by a relatively unsophisticated formula for determining the dispute. If there is a decision or agreement of record, it governs. If there is no decision or agreement of record and no trade agreement. If there is, it governs. If there is no decision or agreement of record and no trade agreement, then the arbitrator looks at established trade practice and practice in the area with particular weight given to employer preference.
- 17. In the Ironworkers' Local 759 view, the above-noted hierarchical criteria undermines the unique quality of the Ontario trade jurisdiction reality. As a result, a decision of record resulting from a dispute from any area of North America may simply be applied "holus bolus" in Ontario without any assessment of whether the application of the decision to the particular circumstances is appropriate.
- 18. The Ironworkers Local 759 asserts that to preserve the public interest with respect to the stability in the construction industry in Ontario, the Board must closely supervise jurisdictional dispute arrangements. The Board must ensure, asserts the Ironworkers Local 759, that all private processes are fair to parties said to be bound to their decisions. The Ironworkers Local 759 asserts that the process pursuant to the plan did not afford them an appropriate measure of natural justice and consequently the Board should remedy that deficiency.

- Both the Boilermakers and A.B.B. took similar positions in respect of this motion. They asserted that Local 759 was bound to the decision of the arbitrator under the Plan because of section 19.1 of the Ironworkers' Agreement. The Boilermakers and A.B.B. assert that the parties, pursuant to the Ironworkers' collective agreement, have a choice of forum. In the case before us, A.B.B filed notice of dispute with the Plan. The hearing on the merits was held on September 27, 1994. A decision was issued on September 29, 1994. The responding parties assert that on the basis of the principle of issue estoppel the Board should decline to entertain the jurisdictional dispute. The responding parties assert that at the very least, Local 759 is a privy of the Ironworkers' International and as such is bound to the Plan decision. (See: Rasanen v. Rosemount Industries Limited, supra; and McIntosh Limousine Service Ltd., supra).
- 20. The responding parties' assert that there is nothing unusual about the practice and procedure before Plan adjudicators. Although the practice and procedure is different than before the Board, but that does not make it any less fair. The parties stipulated to the Plan have all agreed to this procedure. Local 759, as a party to the Ironworkers collective agreement, has agreed to be bound by the decisions of adjudicators pursuant to the Plan. At the time Local 759, as an affiliated bargaining agent, entered into the Ironworkers' Agreement they knew or ought to have known about the Plan's practice and procedures.
- 21. Further Local 759 is an affiliate of the International and the International is stipulated to the Plan and consequently so is the Local. In the responding parties' view, an unfairness would be occasioned if the Plan adjudicator did not follow the Plan's practice and procedure. The practice and procedure utilized by adjudicators appointed according to the provisions to the Plan, although different from the Board's, are not unfair.
- 22. The responding parties' note that although the Ironworkers' have raised an issue of bias against the Plan Arbitrator it was not raised before that arbitrator and consequently the Board should not inquire into that allegation without the Plan Arbitrator first ruling on the motion of bias.

DECISION

- 23. In our view Ironworkers Local 759, through the Ironworkers' Agreement, has agreed to be bound by a decision of the Plan. The decision rendered by the Plan Arbitrator follows the practice and procedure outlined in the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry. It is clear that the practice and procedure in the Plan is different than the practice and procedure before this Board. In our view, parties of their own accord are entitled to make other Work Assignment arrangements which may involve different practices and procedures then those found at the Board. Section 99(3) and 99(5) when read together give the Board a broad discretion about what inquiry, if any, the Board will undertake.
- In this case, all the parties attending at the Plan, including Ironworkers' Local 759, were bound to the Plan decision. The Plan Arbitrator made a decision based on the identical work assignment that we have before us. The Court of Appeal in *Rasanen v. Rosemount Instruments Limited*, *supra*, held that where the question to be decided in a civil action is the same as that which is to be decided in an *Employment Standards Act* proceeding, the doctrine of issue estoppel may apply to the subsequent proceedings. The Court held that parties and their privies may be governed by the operation of the doctrine of issue estoppel even if the determination on the facts is made by a tribunal and notwithstanding that the privies were not parties at the earlier proceedings.
- 25. In McIntosh Limousine Services Ltd., supra, the Board, at paragraph 13 of the decision,

explains the policy reasons for its application of the doctrine of issue estoppel in an application pursuant to what was then section 91 [now section 96]:

13. The rationale for the principle of issue estoppel is self-evident. For the parties to any dispute, there is significant value attached to the finality of litigation between them. In my view, this is particularly true in labour relations matters, having regard to the continuing relationship between parties to many proceedings before the Board. Furthermore, it is an established principle that the same party should not be forced to respond to the same claim in two (or more) proceedings. Both of these public policy concerns (reflecting a desire to avoid duplicative litigation, inconsistent results, and unnecessary expense (both that of the parties and that of the state)) have been identified as pertinent factors for consideration by the Board in previous decisions (see, for example, *Canadian General Electric Company Limited*, [19789] OLRB Rep. April 384; *Napev Construction Limited*, [1980] OLRB Rep. June 862; and *Ellis-Don Limited*, [1992] OLRB Rep. Sept. 999) and, in an appropriate case, the existence of issue estoppel may well lead the Board to not inquire into the merits of an application. In that regard, I note, as an administrative tribunal, the Board is not bound to apply the principle of issue estoppel but has typically applied it to avoid the public policy concerns outlined above.

In my view the above policy reasons are helpful when considering exercise of discretion pertaining to section 99.

26. Local 759 is an affiliate of the International and the relevant collective agreement mandates that the local be bound to all arbitration decisions made pursuant to the Plan, or made by this Board. We find that the work in dispute before us is the same work that was in dispute before the Plan Arbitrator. It is true that the practice and procedure before the Plan is different than the practice and procedure before the Board. In *Rasanen v. Rosemount Instrument Limited, supra*, at p. 280 the Court said the following in respect of different practices and procedures between Courts and administrative tribunals:

As long as the hearing process in the tribunal provides parties with an opportunity to know and meet the case against them, and so long as the decision is within the tribunal's jurisdiction, then regardless of how closely the process mirrors a trial or its procedural antecedents, I can see no principled basis for exempting issues adjudicated by tribunals from the operation of issue estoppel in a subsequent action. If the purpose of issue estoppel is to prevent the retrial of "[a]ny right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction" (McIntosh v. Parent, supra), then it is difficult to see why the decisions of an administrative tribunal having jurisdiction to decide the issue, would not qualify as decisions of a court of competent jurisdiction so as to preclude the redetermination of the same issues: Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), [1991] 2 S.C.R. 5, 81 D.L.R. (4th) 121; Douglas/Kwantleen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570, 77 D.L.R. (4th) 94. On the contrary, the policy objectives underlying issue estoppel, such as avoiding duplicative litigation, inconsistent results, undue costs, and inconclusive proceedings, are enhanced in appropriate circumstances by acknowledging as binding the integrity of tribunal decisions.

The same may be said between labour board and Arbitration Panels.

- 27. The Board has a broad discretion in deciding whether or not to inquire into a particular jurisdictional dispute. Although the relevant collective agreement may allow optional avenues, to the Plan or to this Board, when a Panel adjudication under the Plan involving the same work has been decided, there would have to be an extremely good reason for this Board to interfere with the decision of the Plan adjudicator.
- 28. The Ironworkers Local 759 alleges breaches of natural justice by the Plan adjudicator as one reason we should inquire into the dispute. However, the matters complained of in this respect are parts or methods of an acceptable practice and procedure, and one process that has been agreed to by all parties stipulated to the Plan. The Board does not find them so troubling that it

should provide a second forum here for dealing with the same complaint. The Ironworkers Local 759, through its International, has had the opportunity to address the issues of how the Plan should operate. If the Ironworkers Local 759 believes that the International has not acted in its best interests it may pursue remedies elsewhere. Further, if the Plan and its practices and procedures cause such a great problem for the Ironworkers, one wonders why its collective agreement binds it to decisions of the Plan.

- 29. It is our view that section 99(5) gives the Board the jurisdiction to review or to decline to review decisions made under other work assignment arrangements. It is also our view that the Board should only exercise its discretion to review decisions pursuant to those arrangements in the rarest of circumstances. It is in the interest of all concerned that parties achieve tailor-made work assignment arrangements to suit their special labour relations needs, and that having done so, they live by them.
- 30. The Board dismisses this work assignment complaint, as all the matters in dispute have been adjudicated upon, and there is no good reason in these circumstances to inquire further into the complaint.

4069-95-R; **4070-95-R**; **4072-95-R** United Steelworkers of America, Applicant v. **Burns International Security Services Limited**, Responding Party v. United Food and Commercial Workers International Union, Local 333 (Canadian Security Union) and International Union United Plant Guard Workers of America Local 1956, Intervenors; United Food and Commercial Workers International Union, Local 333 (Canadian Security Union), Applicant v. Burns International Security Services Limited, Responding Party v. United Steelworkers of America and International Union United Plant Guard Workers of America Local 1956, Intervenors

Certification - Practice and Procedure - Representation Vote - Security Guards - Timeliness - USWA and CSU each filing application to displace UPGW as bargaining agent for security guard employees of employer - Board concluding that USWA's first application filed day before commencement of last two months of UPGW collective agreement's operation and, therefore, untimely - USWA filing subsequent application on same day as CSU - Board distinguishing Carleton Board of Education case and exercising its discretion under section 111(3) of the Act to process the two applications together - Board finding that USWA and CSU each appearing to enjoy membership support of at least 40% in their proposed bargaining units - Board directing three-way representation vote - Board rejecting request to postpone vote until hearing into various "40% threshold" assertions or allegations concerning conflicts of interest resulting from applicant unions becoming certified - Board explaining its practice concerning how, when and on what information it determines that a representation vote should be ordered in certification applications

BEFORE: G. T. Surdykowski, Vice-Chair.

DECISION OF THE BOARD; April 12, 1996

I

- 1. These are three applications for certification. They were made shortly after the recent public service strike began. That strike, now ended, had a serious and direct impact generally on the Board, and specifically on these applications.
- 2. During the course of that strike, several endorsements were made in the applications. The following is a review of some of those endorsements, together with the reasons for them where necessary or as I consider appropriate.

H

3. In response to inquiries from some of the parties with respect to the filing of materials in the applications, a teleconference was convened on March 6, 1996 to canvass the parties with respect to how the Board should proceed with them. During that teleconference, a number of issues were identified. On agreement of the parties, a hearing was scheduled to deal with those issues, which are identified in the Board's March 6, 1996 endorsement in that respect (attached to this decision as Appendix 1).

III

- 4. A hearing was convened on March 11, 1996. The results of that hearing are contained in the first March 12, 1996 endorsement (attached as Appendix 2).
- 5. Upon hearing the representations of the parties, I dismissed the application of the United Steelworkers of America (the "USWA") in Board File No. 4069-95-R as untimely.
- 6. That application was made by fax on February 26, 1996. The collective agreement in effect between the responding employer ("Burns") and the incumbent trade union (the "UPGWA") at the time these applications were made contains the following duration clause:

This agreement shall come into effect the 26 day of April, 1993 and shall remain in effect until midnight on the 26 day of April, 1996 and shall be automatically renewed for successive periods of one year each thereafter, unless either party gives to the other notice of its intention to negotiate amendments hereto to the sixty day period immediately prior to the expiry date of this agreement or any successive term hereof.

- 7. Section 7(4) of the Labour Relations Act, 1995 provides that:
 - 7. (4) Where a collective agreement is for a term of not more than three years, a trade union may apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement only after the commencement of the last two months of its operation.

(emphasis added)

8. It is not common for parties to a collective agreement to specify that it expires at a specific time on a particular day. Nevertheless, that is what Burns and the UPGWA have done, which resulted in the timeliness issue in Board File No. 4069-95-R. In that respect, the USWA was alone in taking the position that the last two months of the Burns - UPGWA collective agreement commenced on April 26, 1996. The USWA's view was that the time "midnight on the 26 day of April, 1996" separates April 25 from April 26 so that the first moment of April 26 after midnight is within the "open period" specified by section 7(4) of the Act; that is, that the last two months of the collective agreement commenced at 00:00:01 a.m. on February 26, 1996.

- 9. I did not agree. In every day usage, midnight is considered to come at the end of a day, not the beginning. Consequently, "midnight on the 26 day of April, 1996" comes at the end of April 26th and the first moment after midnight on April 26th 1996 will be 00:00:01 on April 27, 1996. Concomitantly, "the last two months of ... operation" of the collective agreement began two months earlier; that is, at the first moment of February 27, 1996 (ie. 00:00:01 a.m.). Since the application was made prior to that, on April 26, 1996, it was not made "only after the commencement of the last two months of ... operation" of the collective agreement.
- 10. In an alternative argument, the USWA referred to the decision of the Ontario Court of Appeal in Re. United Headwear, Optical and Allied Workers Union of Canada, Local 3 et. al and Biltmore/Stetson (Canada) Inc. et. al. (1983) 13 O.R. (2d) 243, and argued that even if its application in Board File No. 4069-95-R was one day late, the Board should conclude that it "continued to speak" into February 27, 1996 when it was timely and that that application should therefor be treated as having been made first.
- It was not persuaded by that argument either. The *Biltmore/Stetson*, *supra*, case concerned a notice to bargain given in a sale of business situation. That is significantly different from the issue in this case. Both practically and legally, a notice to bargain does "continue to speak" after it is given. In this case, however, the Board was concerned with an *application* which is in the nature of an originating notice for legal purposes. Like a Statement of Claim issued in the civil courts, an application is either timely or it is not, and what is important, particularly for purposes of section 7(4) of the Act, is not whether or not it "continues to speak" (because for purposes of things like the statutory freeze in section 86(2) of the Act, for example, an application for certification does "continue to speak"), but rather when it "begins to speak". If it "begins to speak" too soon, it cannot be heard.
- 12. In the result, the application in Board File No. 4069-95-R was dismissed as untimely.
- I note that, even if it had been considered to be timely on the basis of the USWA's alternative argument, the USWA would have had two applications made on February 27, 1996, because Board File No. 4072-95-R is another application for certification by the USWA which is in all respects other than when it was filed identical to the application in Board File No. 4069-95-R. Because of my determination of the second issue (see below), the USWA would have been in no different position than it is now even if I had accepted its alternative argument. (I note also that neither section 111(3) of the Act, nor the Board's approach in *Northern Telecom Canada Limited*, [1979] OLRB Rep. June 544, the correctness of which I respectfully suggest is doubtful, applied to this first issue because there was no application other than the one in Board File No. 4069-95-R to consider.)

IV

- 14. The second issue on March 11, 1996 concerned the exercise of the Board's discretion under section 111(3) of the *Labour Relations Act*, 1995 which provides that:
 - 111. (3) Despite sections 7 and 63, where an application has been made for certification of a trade union as bargaining agent for employees in a bargaining unit or for a declaration that the trade union no longer represents the employees in a bargaining unit and a final decision of the application has not been issued by the Board at the time a subsequent application for the certification or for the declaration is made with respect to any of the employees affected by the original application, the Board may,
 - (a) treat the subsequent application as having been made on the date of the making of the original application;

- (b) postpone consideration of the subsequent application until a final decision has been issued on the original application and thereafter consider the subsequent application but subject to any final decision issued by the Board on the original application; or
- (c) refuse to entertain the subsequent application.
- 15. I do not think it useful to detail the arguments put forward on this issue. In essence, the position of the USWA was that even though its application in Board File No. 4072-95-R and the application by the United Food and Commercial Workers International Union, Local 333 (Canadian Security Union) (herein "Local 333") in Board File No. 4070-95-R were both made on February 27, 1996, the Board should postpone consideration of Local 333's application until the final decision has been issued in its (the USWA's) application. Counsel argued that this result was suggested by the Board's decision in *The Carleton Board of Education*, [1993] OLRB Rep. Feb. 102, which decision is as applicable and persuasive under Bill 7 as it was under the legislation in effect at the time it was made (that is, the "Bill 40" *Labour Relations Act* which was in effect from January 1, 1993 until Bill 7 was proclaimed on November 10, 1995). In that decision, the Board established its general approach to issues under what is now section 111(3) of the Act under the Bill 40 *Labour Relations Act* (which was different from the Board's approach under the pre-Bill 40 legislation) as follows:

• • •

- 4. Prior to the recent changes to the *Labour Relations Act* both the application date and the terminal date were necessary reference points for determining the level of support among employees. However, the terminal date is no longer relevant in determining the level of membership support enjoyed by any applicant for certification. Both the number of employees in the bargaining unit and the level of membership support enjoyed by the trade union among those employees is now determined as of the date of application (see section 8 (1)).
- 5. M. Pickard Construction Co. Ltd., [1989] OLRB Rep. Oct. 1046 filed by the OSSTF is of little assistance. Its discussion is primarily centered on which terminal date the Board should assign a subsequent application in circumstances where that date was highly relevant to the outcome of an application. While there may well be circumstances where it would be appropriate to utilize the option described in section 105(3)(a) [now section 111(3)], we are of the view that section 105(3) read in light of section 8 of the Act, now places greater emphasis on the application that is first in time. That first applicant must still of course establish that it enjoys the support of the majority of the employees in the bargaining unit. Other interests are protected in that there may well be grounds for another trade union to intervene on behalf of employees in the bargaining unit in respect of a first application. We note that a request to intervene has been filed by the OSSTF in Board File No. 3015-92-R prior to the terminal date of the Association's application.

. . .

- 16. The Carleton Board of Education, supra, did not deal with a situation where two (or more) applications for certification were made on the same day. Nor does any other Board decision of which I am aware under either the Bill 40 or other previous Labour Relations Acts. That decision is neither applicable nor necessarily helpful in this case, although it may be that the Board will take the same approach under Bill 7 in circumstances like those in The Carleton Board of Education, supra.
- 17. The words "at the time" in section 111(3) are also found in sections 8(2) and 66(3) of the *Labour Relations Act*, 1995. It is not a new phrase. It was also contained in the certification and termination provisions of the Bill 40 and pre-Bill 40 legislation. It is a phrase which has always been interpreted by the Board to refer to the day on which an application is filed, and not to some

smaller unit of time within a day. I see no reason to change that approach under the *Labour Relations Act*, 1995, particularly when section 111(3) specifically provides that a "subsequent application" may be treated as having been made on the same date as the "original application". I can think of no cogent reason for dealing with two applications for certification made on the same day with respect to the same group of employees separately. Accordingly, as reflected in the first March 12, 1996 endorsement, I ruled that the second USWA application (ie. Board File No. 4072-95-R and the application by Local 333 (referred to as the "UFCWU" in the endorsement) should be treated as having been made on the same date and that those two applications should proceed together for all purposes. This would necessarily require any representation vote to be a 3-way vote.

V

- 18. Third, Burns and the UPGWA submitted that no representation vote could or should be held until the applicants in each application first established that at least 40 percent of the employees determined to be in the bargaining unit at the material time were members in it, and until the "section 14 conflict issue" (as it was described in the hearing) was disposed of, both of which would require a hearing before the Board.
- 19. Again, I find it unnecessary to detail the submissions made by counsel on this issue. Having considered the representations of the parties, the materials filed and the requirements and intent of the Bill 7 *Labour Relations Act*. I concluded that a 3-way representation vote in the two remaining applications should be held before any hearing into the issues which have been raised.
- I note that, as I subsequently ruled in the March 25, 1996 endorsement (Appendix 4), no vote could be held in these applications until the public service strike ended. For the same reason, no hearing could be held either (notwithstanding that some Board hearings did proceed during the strike: most, if not all, of which were either related to the strike itself, or to unrelated alleged unlawful strike activity, or were continuations of hearings which had begun prior to the strike). If the view of the employer and the incumbent trade union had prevailed, a vote could not have been held for a very long time. Such a result would be contrary to the purpose and intent of Bill 7; that is, that the mandatory representation vote be held quickly. On the contrary, if the Board had accepted the position of Burns and the UPGWA, the mandatory representation vote, which the employer community has clamoured for for years, would be put off indefinitely while the parties engaged in complex and expensive litigation which might not even be necessary if the vote is held and counted. But more on this later.
- Although there are many important and significant differences between the Bill 7 Labour Relations Act, 1995, and both the Bill 40 Act and the pre-Bill 40 Act, the fundamental scheme of the legislation remains simple and unchanged by Bill 7. Except for those individuals who are specifically excluded by the Act, every person has the right to join with others in a trade union, and to bargain collectively through that trade union with their common employer. The right of employees to organize themselves and bargain collectively with their employer is guaranteed by Bill 7.
- A trade union can become the exclusive bargaining agent for employees either through voluntary recognition (which is uncommon outside of the construction industry), or by being certified as such when a majority of the employees in an appropriate bargaining unit indicate that that is their wish (or under section 11). (There is an analogous process for terminating bargaining rights as well.)
- 23. It is important to remember that although trade unions and employers have important

rights and obligations under it as well, the focus of the *Labour Relations Act*, 1995 (as was the case in the previous legislation) is on codifying and protecting the rights of employees. Up to this point in these applications, as is generally the case in the certification process, the proceedings have involved the institutional parties. The employees who are the subject of the proceedings have not been heard by the Board. Nor will they be until they have an opportunity to express their wishes in a representation vote. Under the Bill 7 certification system, a representation vote is the primary means by which employees speak to the Board.

- 24. In determining what is permitted, required or prohibited under Bill 7, it is helpful to recall what the pre-Bill 7 scheme looked like. Under every *Labour Relations Act* prior to Bill 7, the certification scheme was document based. It was primarily a card counting process in which the representation vote was essentially a residual mechanism. Prior to Bill 7, the representation vote was used in certification applications where, as in this case, there was an incumbent trade union, where the applicant had not filed sufficient membership evidence to be certified without a vote, or where there was something in the application which required the apparent support for the applicant to be confirmed by a vote. In fact, the vast majority of certification and applications prior to Bill 7 were disposed of without a vote.
- Despite the fact that every pre-Bill 7 certification scheme was document based, nothing in any pre-Bill 7 *Labour Relations Act* specified the materials which were to be before the Board for that purpose. Nor were there any time limits, other than when an application could be made, within which anything had to be done. (Although the Bill 40 legislation did specify that the Board could not consider certain evidence if it was submitted after the certification application date.) Instead, the Board established pleading and other guidelines, both generally through its rule making process and "rules of thumb" which the Board developed in its jurisprudence, and in specific cases which required special treatment. The Board's approach in that respect evolved over many years, and was shaped by the *Labour Relations Act* in effect at the time and the Board's experience. Under every pre-Bill 7 certification system, the Board was required to make specific determinations in sequence as follows:
 - (a) First, the Board was required to determine an appropriate bargaining unit;
 - (b) Then the Board had to ascertain the number of employees in that bargaining unit at the time the application was made (which was interpreted as the date that the application was made);
 - (c) Next, the Board assessed the applicant trade union's documentary evidence of membership and other materials filed in support of the application in order to ascertain the number of employees in the bargaining unit who were or had applied to become members of the applicant in accordance with the evidentiary rules established therefor;
 - (d) Then, if the applicant trade union had achieved the statutory majority (fifty-five percent of the employees in the bargaining unit) in that respect, the Board could either certify the trade union, or order a representation vote if it was satisfied that one was appropriate;
 - (e) The Board was required to order a vote where the applicant trade union's materials established membership support within the bar-

gaining unit within a specified range (the upper end of which was the fifty-five percent threshold for certification without a vote).

- 26. The pre-Bill 7 legislation also contained an alternative mechanism commonly referred to as the "pre-hearing vote" process, which a trade union could request when making an application. As its name suggests, the pre-hearing vote process was intended to postpone any litigation until after a representation vote was taken, and that is precisely the way the Board dealt with such applications. That is, regardless of what issues might be raised in an application, including the applicant's right to make the application or any bargaining unit description or composition issues, the Board's general and almost invariable approach was to hold a vote before convening a hearing into any of those issues.
- In an application for certification in which a pre-hearing vote was requested, the Board 27. had the discretion to determine a "voting constituency", which was an employee grouping for purposes of the vote and which was not necessarily an "appropriate bargaining unit". Having determined the voting constituency, the Board examined the "the records of the trade union and the records of the employer" to see whether there was an "appearance" of support for the applicant of not less than a specified percentage of employees within the voting constituency. If that appeared to be the case, the Board directed a vote. However, the Board could not give effect to the results of such a vote until the Board subsequently determined the bargaining unit description, and made a finding that the applicant trade union had at least the threshold level of membership support in that bargaining unit (not the voting constituency), and dealt with any other issues effecting the trade union's right to be certified (see section 9 of the Bill 40 and the pre-Bill 40 Labour Relations Acts and see generally Emery Industries Ltd., [1980] OLRB Rep. Mar. 316; The Board of Education for the City of North York, [1984] OLRB Rep. July 989). Accordingly, the pre-hearing vote model in the pre-Bill 7 legislation postponed litigation until after a vote, but it did little to narrow the issues or guarantee a quick disposition of an application.
- 28. Prior to Bill 7, it was not at all unusual to see issues raised concerning the bargaining unit appropriate for the application, the composition of (ie. the list of employees in), or the right or ability of the applicant trade union to bring the application or to be certified. On the contrary, these were very common issues, and dealing with them took time, sometimes substantial amounts of time.

VI

29. The *Labour Relations Act*, 1995 became law when Bill 7 was given Royal Assent on November 10, 1995. Under the *Labour Relations Act*, 1995 the certification system is substantially different from what it was before. Sections 7(8) to (14), 8(1) to (4) and (8), 9(1) and (10) contain the provisions relevant to the issue in this case, and provide as follows:

7. • •

- (8) An application for certification may be withdrawn by the applicant upon such conditions as the Board may determine.
- (9) If the trade union withdraws the application before a representation vote is taken, the Board may refuse to consider another application for certification by the trade union as the bargaining agent of the employees in the proposed bargaining unit until one year or such shorter period as the Board considers appropriate has elapsed after the application is withdrawn.
- (10) If the trade union withdraws the application after the representation vote is taken, the Board shall not consider another application for certification by the trade union as the bargain-

ing agent of the employees in the proposed bargaining unit until one year has elapsed after the application is withdrawn.

- (11) The trade union shall deliver a copy of the application for certification to the employer by such time as is required under the rules made by the Board and, if there is no rule, not later than the day on which the application is filed with the Board.
- (12) The application for certification shall include a written description of the proposed bargaining unit including an estimate of the number of individuals in the unit.
- (13) The application for certification shall be accompanied by a list of the names of the union members in the proposed bargaining unit and evidence of their status as union members, but the trade union shall not give this information to the employer.
- (14) If the employer disagrees with the description of the proposed bargaining unit, the employer may give the Board a written description of the bargaining unit that the employer proposes and shall do so within two days (excluding Saturdays, Sundays and holidays) after the day on which the employer receives the application for certification.
- **8.** (1) Upon receiving an application for certification, the Board may determine the voting constituency to be used for a representation vote and in doing so shall take into account,
 - (a) the description of the proposed bargaining unit included in the application for certification; and
 - (b) the description, if any, of the bargaining unit that the employer proposes.
- (2) If the Board determines that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification appear to be members of the union at the time the application was filed, the Board shall direct that a representation vote be taken among the individuals in the voting constituency.
- (3) The number of individuals in the proposed bargaining unit who appear to be members of the trade union shall be determined with reference only to the information provided in the application for certification and the accompanying information provided under subsection 7(13).
- (4) The Board shall not hold a hearing when making a decision under subsection (1) or (2).

• • •

- (8) After the representation vote has been taken, the Board may hold a hearing if the Board considers it necessary in order to dispose of the application for certification.
- 9. (1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

. . .

- 10. (1) The Board shall certify a trade union as the bargaining agent of the employees in a bargaining unit that is determined by the Board to be appropriate for collective bargaining if more than 50 per cent of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.
- (2) The Board shall not certify the trade union as bargaining agent and shall dismiss the application for certification if 50 per cent or less of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.
- (3) If the Board dismisses an application for certification under this section, the Board shall not

consider another application for certification by the trade union as the bargaining agent of the employees in the bargaining unit until one year has elapsed after the dismissal.

The clear intent of these provisions is to change the certification process from a document based system to a streamlined representation vote system designed to avoid "front end" litigation and give employees an opportunity to express their wishes in a quick representation vote. Bill 7's message is clear: things are to be done differently. Consequently, the Board's way of handling certification applications has had to change. Not only does the Board not have to do many of the things it did prior to the *Labour Relations Act*, 1995, it is specifically prohibited from doing some of them.

- 30. First, sections 7(11) to (14) contain legislated pleading and filing rules which are designed to establish the simplified record required to accommodate the five day vote model directed in section 8(5). In that respect, section 7(12) requires a trade union to make an application for certification which includes two things: (1) a written description of a *proposed* bargaining unit; and (2) an *estimate* of the number of individuals in the proposed unit. This recognizes that a trade union may propose a bargaining unit which is not appropriate, and may not know the number of employees even in the bargaining unit it proposes.
- 31. Section 7(13) requires the trade union to file a list of its members in its proposed bargaining unit and evidence that they are members.
- 32. Section 7(14) *allows* an employer which disagrees with the bargaining unit proposed by the applicant trade union to give the Board a written description it proposes within two days of receiving the application.
- 33. The Labour Relations Act, 1995 does not require an employer to file anything. Although an employer is undoubtedly allowed to file other things, the only issue which the Act addresses in that respect is a possible dispute about the bargaining unit description which may have to be considered in striking the appropriate voting constituency. The Labour Relations Act, 1995 does not require or even contemplate that an employer file a list of employees in either the trade union's proposed bargaining unit, or in its own if it disagrees with what the union has proposed. An employer is not required or even invited to respond to the trade union's estimate of the number (or identity) of employees in any proposed bargaining unit. Indeed, the reference to the "records of the employer", and the invitation to the Board to compare those records to the "records of the trade union" found in the provisions which established the pre-Bill 7 pre-hearing vote system are conspicuous by their absence. (Nor is there anything anywhere in sections 7 to 10 anything like section 63(7) of the Labour Relations Act, 1995 which contemplates the Board seeking or acquiring information to determine the specific number of employees in the bargaining unit.)
- In the result, all that Bill 7 contemplates the Board will have in an application for certification prior to determining whether or not a vote is to be directed is:
 - (1) The application with the union's proposed bargaining unit and its estimate of individuals in it;
 - (2) The union's list of union members in its proposed unit and evidence of their status as such; and
 - (3) The employer's proposed bargaining unit if it disagrees with the union's suggestion.
- 35. Section 8 tells the Board what to do, and what it can not do, with that information. Section 8(1) gives the Board the discretion to determine the voting constituency to be used in the man-

datory representation vote. In doing so, the Board is required to take into account the trade union's proposed bargaining unit and the employer's proposed bargaining unit if any.

- Then, Section 8(2) requires that the Board determine whether forty percent or more of the individuals in the *trade union's proposed bargaining unit* (not in the voting constituency) appear to be members of the union at the time the application was made. If that appears to be the case, the Board is required to direct a representation vote in the voting constituency. That is, if it appears that forty percent or more of the individuals in the union's proposed bargaining unit were members of the union on the date the application was made, a vote must be held in the voting constituency. Further, section 8(3) directs the Board to determine the section 8(2) question with reference only to the information provided in the application (under section 7(12)) and under section 7(13). That is, the Board is required to make the section 8(2) determination only on the basis of what the trade union says.
- 37. There is nothing anywhere in the provisions of the Labour Relations Act, 1995 which directs or suggests that the Board can or should consider anything else prior to directing a vote. Indeed, the language of the provision specifically provides otherwise. Further, not only is there nothing in the certification provisions which suggests that the Board may have to hold a hearing before it makes either a section 8(1) or a section 8(2) determination, section 8(4) specifically prohibits the Board from doing so. Even if the Board wants to hold a hearing before a representation vote, it cannot do so. I note that the words of section 8(4) stand in sharp contrast with the words of section 99(3) of the Act in that respect.
- 38. The words of section 8(1) to (4) make this conclusion inescapable. Further, this conclusion is consistent with the legislative intent that wherever possible representation votes should take place within five days of the application being filed with the Board (section 8(5)), with section 8(8) which permits the Board to hold a hearing after the vote before disposing of the application, and with the provisions of section 11 which contemplate a hearing after a vote is taken. (In sections 111(1) and (2) for example, the "circumstances" include that "no other remedy, including the taking of another representation vote, is sufficient to counter to effects of the contravention" (emphasis added), and section 11(3) allows the Board to consider the results of a vote when making a decision under section 11.)
- 39. This result is consistent with the general intent of the *Labour Relations Act*, 1995 to provide employees with quick representation votes. It is also, with respect, a sensible way to proceed in a vote based system, both generally and specifically in this case. First, as a practical matter, both the positions of the parties and what issues it is necessary and appropriate for the Board to determine is likely to be influenced by the result of the vote. It has been the Board's experience over the years that vote results can make some or all issues practically, as well as legally, moot. Hearing the voice of the employees can affect the appetite of a party to try to litigate a result which would be at odds with the employees' wishes. Indeed, prior to Bill 7, the employer community made the argument that votes would have this "clearing of the air" benefit in support of its lobby for a "vote in every case".
- 40. Second, in this case, if the UPGWA wins the vote, both of these applications will be dismissed and *no* hearing will be necessary or appropriate on any issue raised by Burns or the UPGWA. Even if the UPGWA does not win, only one of the applicant's can. Both the section 14 conflict issue, and the list of employees/forty percent threshold issue have been raised with respect to both applicants. With at least one applicant gone, any hearing with respect to those or any other issues will necessarily be shorter and less complex. In addition, I see no reason why any of the issues raised cannot be the subject of a hearing if one is necessary, after a vote.

- 41. Further, it has been the Board's experience that the most reliable vote results come from votes which are held quickly, particularly in industries like the security guard or construction industries where employment levels can fluctuate dramatically and employee turnover tends to be high. As a general matter, the more quickly a vote is taken, the more reliable it is likely to be as an indicator of employee wishes.
- A2. Nor am I impressed by the specter of trade union abuse of the certification process, the suggestion being that trade unions may be less diligent or perhaps even dishonest with respect to the material they file with the Board in order to obtain a vote. This boogie man has been put forward in different guises for many years, but the Board's experience is that there is little if any substance to it. There is no doubt that mistakes have been made by trade unions. On rare occasions, a trade union may have tried to mislead the Board. On the other hand, it is not unknown for employers to make their own mistakes, or to attempt to mislead the Board. (Indeed, much of the "list of employees" litigation under pre-Bill 7 *Labour Relations Acts* involved such "mistakes" and it is not unknown for employers to take "tactical" positions, the only effect of which is to delay the inevitable, and which would, if allowed under the *Labour Relations Act*, 1995, seriously impair the Board's ability to take quick votes.)
- Further, what if a trade union does manipulate its application for the purpose of obtaining a representation vote to which it may not be entitled? What if, for example, a trade union says that there are 800 employees in a bargaining unit when it knows there are 1500 employees in it, or what if that turns out to be the case even if the union didn't know it? Could the Legislature have intended that there be a vote in such cases? On the language of the statute, the answer appears to be "yes". The Bill 7 certification system is designed to facilitate representation votes, and the Legislature has indicated a willingness to trust unions to put forward honest applications. Furthermore, abuse hypotheticals are exaggerated and therefor unhelpful. Intentional misrepresentation can arguably be dealt with under section 64 ("where certificate obtained by fraud"), or, as effectively for practical purposes, at the ballot box. Why would a trade union intentionally misrepresent a situation in which the mandatory representation vote will quickly reveal its actual level of support? The fact is that a trade union which conducts itself in that way or which has failed to organize support in a bargaining unit is doomed to lose the vote. Further, a trade union which loses a vote faces a mandatory bar preventing it from making any new application for a period of one year (section 10(3)), or even if it withdraws an application after a vote is taken (section 7(10)).
- Nor is there anything obviously wrong with a union obtaining bargaining rights after a representation vote when it was mistaken in its estimate of the size of the bargaining unit and did not actually have forty percent support in the first place, having regard to the current statute and the values it espouses. The *Labour Relations Act, 1995* provides a broad scope for the expression of employee wishes and, taken as a whole, suggests that in the absence of the circumstances described in section 11 (and perhaps sections 14 or 64 to offer to other examples), the wishes of employees as expressed in a vote should be determinative; that is, that the "vote in every case" be the determining factor or final arbiter.
- Finally, it was suggested that it would be "bad labour relations" if one of the applicants were to win the vote, but it is subsequently determined by the Board that that applicant cannot be certified for the bargaining unit herein (see below) for other reasons, either because of section 14 or otherwise. Why? If that is the result, it is the result, and Burns and the UPGWA will nevertheless have had the benefit of being instructed by the voice of the employees.
- 46. In the result, I was satisfied that the provisions of the *Labour Relations Act*, 1995

required that there be a representation vote before the Board holds a hearing into any issue raised in these applications for certification and I so ruled.

VII

- 47. I then proceeded to determine the voting constituency under section 8(1). In these applications (as in most non-construction cases in which there is an incumbent trade union and an existing collective agreement), the bargaining unit proposed by both applicants mirrors the bargaining unit described in the collective agreement between Burns and the UPGWA, and all parties agreed that that also described the appropriate voting constituency. Having regard to the materials filed, and to the agreement of the parties, I found that to be the appropriate voting constituency for these applications. (I note that I did *not* make a bargaining unit determination under section 9(1).)
- 48. My direction that a 3-way representation vote be taken in these applications was initially less than clear. Nevertheless, the first March 12, 1996 endorsement did and was intended to so direct (as I indicated in the subsequent March 25, 1996 and March 31, 1996 (Appendix 5) endorsements). In addition, although it was implicit in the first March 12, 1996 endorsement, I inadvertently did not set out my determination, under section 8(2), that forty percent or more of the individuals in the bargaining unit appeared to me to be members of the applicant trade union in each application at the time that the respective applications were filed, and that each applicant was therefor entitled to a representation vote, which in this case would take the form of a 3-way vote. I rectified this in the March 31, 1996 endorsement.

VIII

- 49. Finally, I note that the "entitlement to a vote" and the section 14 conflict issues raised by Burns and the UPGWA are still "live", and it is open to them to seek to pursue these issues after the representation vote herein is taken. Particularly with respect to the former issue, the observations I have made about the scheme and interpretation of the *Labour Relations Act*, 1995 were a necessary part of the reasons from my decision that a representation vote should be held before any hearing, and although suggestive of my thinking, are not determinative of that issue.
- 50. This decision reflects the Board's practice in certification proceedings under the *Labour Relations Act*, 1995 and the reasons for that practice. Burns is entitled to challenge that practice in a hearing, but in this case, that hearing will not be held until after the vote is taken (which will not be until almost two months after the applications were filed. I am not seized with this matter for the purpose of any post vote hearing.

APPENDIX 1

BOARD ENDORSEMENT

Date: March 6, 1996

Before: G. T. Surdykowski, Vice-Chair.

Board File: 4069-95-R

4070-95-R 4072-95-R

These are 3 applications for certification. A teleconference call was convened on March 6, 1996 to canvass the parties with respect to how the Board should proceed with these applications. Having regard to the materials filed, and to what was said by counsel during the teleconference, a hearing will be required to hear the representations of the parties with respect to the following issues:

- the timeliness of the application in Board File No. 4069-95-R (the "first USWA application);
- 2. if the first USWA application is timely, what decision is appropriate under section 111(3) of the Labour Relations Act. 1995;
- 3. if the first USWA application is untimely, what decision is appropriate under section 111(3) with respect to the other 2 applications;
- 4. Whether the Board can or should hold a hearing with respect to the various "40% threshold" assertions or allegations, or the s. 14 issue, or both, before conducting a representation vote in any application which the Board finds it appropriate to proceed with herein:
- 5. the USWA's request for interim relief, and other issues raised by the parties with respect to the taking of any representation vote, particularly if the Board declines to hold a hearing before holding a vote;
- 6. how any hearing which precedes a vote should proceed;
- 7. how any hearing which follows a vote should proceed,
- 8. any other issue as appropriate.

I note that with respect to the employee list issues, the responding employer has now agreed to provide such lists in each application. Having regard to what was said during the teleconference, I find it appropriate to direct, as I indicated I would, that any list of employees filed by the employer in any of these 3 applications not be provided or otherwise disclosed to anyone else, including any of the other parties until the Board so directs. Any list filed in an application which turns out to be unnecessary or irrelevant will be returned to the employer or destroyed (as the employer chooses) without being provided or disclosed to anyone else.

The hearing to deal with the issues as aforesaid will take place on Monday, March 11, 1996 beginning at 9:30 a.m. at Victory Verbatim Services, Suite 3320, TD Bank Tower, 66 Wellington Street W., Toronto.

On agreement of the parties, the 3 trade union parties will share the cost of the hearing room.

"G. T. Surdykowski"
for the Board

APPENDIX 2

BOARD ENDORSEMENT

Date: March 12, 1996

Before: G. T. Surdykowski, Vice-Chair.

Board File: 4069-95-R

4070-95-R 4072-95-R

Upon hearing the representations of the parties at a hearing convened on March 11, 1996, I ruled, orally, that:

- 1. The last 2 months of the collective agreement herein between the responding employer and the intervenor UPGWA, Local 1956 commenced the first moment of February 27, 1996, that the application by the USWA in Bd. File No. 4069-95-R was not made "after the commencement of the last 2 months of [that collective agreement's] operation" (section 7(4) of the Labour Relations Act, 1995), and that the application was therefore untimely. I further ruled that I was not persuaded by the USWA's argument in the alternative (based on Re United Headwear Union and Biltmore/Stetson (Canada) Inc. (1983) 43 O.R. (2d) 243 (Ont. C.A.) and other cases). I therefore dismissed the application in Bd. File No. 4069-95-R.
- 2. In the exercise of the Board's discretion under section 111(3) of the Act, the second USWA application (Bd. File No. 4072-95-R) and the UFCWU application (Bd. File No. 4070-95-R) should be treated as having been made on the same date (as indeed they were), and those 2 applications should proceed together for all purposes, including the taking of a representation vote if one is held. Any such vote will therefore be a 3-way vote.

Further, having regard to the representations of the parties at the hearing, I find it appropriate to direct, in the circumstances, that:

- (a) the 3-way representation vote be held before a hearing is held with respect to any of the issues which have been raised;
- (b) the parties meet with a Labour Relations
 Officer, to be designated by the Board's
 Manager of Field Services, as soon as
 possible, to make the necessary vote
 arrangements for the taking of the vote,
 and that a Vice-Chair be available to rule
 on any disputes between the parties in
 that respect.

Having regard to the agreement of the parties at the hearing, I direct a mailing to each person whose name appears on the voters list in accordance with the procedure followed in <u>Metropol Security Services</u>, [1993] OLRB Rep. Nov. 1154 (paragraph 16).

In that respect, I find that the voting constituency should reflect the bargaining unit agreed to between the parties. Accordingly:

All security quards employed by Burns International Security Services Limited in the County of Sussex, the County of Kent, the County of Middlesex, the County of Oxford, the County of Perth, the County of Essex, the County of Huron, the County of Lambton, save and except Guard Inspectors or their designates, persons above the rank of Guard Inspector or their designate, office, clerical and sales staff, and students employed during school vacation periods; and in the County of Wellington, the County of Brant, the Regional Municipality of Waterloo, the Regional Municipality of Hamilton Wentworth, the Town of Milton, the Town of Haldimand, the City of Burlington, the City of Niagara Falls, the City of St. Catherines, the Town of West Lincoln, the Town of Grimsby, the City of Welland, the Town of Fort Erie, the Town of Dunnville, the City of Clarkson (Petro Canada), save and except Site Supervisors or their designates, Guard Inspectors or their designates, persons above the rank of Site Supervisor or their designate, Guard Inspector or their designate, office, clerical and sales staff, and students employed during school vacation periods will be entitled to vote.

Written reasons for the above will follow.

- 3 -

I think it premature to deal with any vote arrangement issues, including the form of the ballot, and also with whether or not the ballot box(es) should be sealed. Any such matters should first be dealt with by the Officer assigned to the matter.

I also think it premature to deal with any hearing procedure issues. These are best dealt with after it is clear what those issues are, and probably by the panel assigned to the hearing.

The applications are referred to the Registrar.

"G. T. Surdykowski"
for the Board

APPENDIX 3

Endorsement 4070-95-R 4072-95-R

March 12/96

G.T. Surdykowskij Vice-Chair

In the circumstances, I can think of no reason why the responding employer's to lists of employees in these applications should not be provided to the trade union parties. Accordingly, I direct that they be released to the applicants and the intervenor trute union, preferably in advance of the meeting to be scheduled to make the vote arrangements. M'3/4/ for the Board

APPENDIX 4

ENDORSEMENT

March 25, 1996

G.T. Surdykowski, Vice-Chair

Board Files 4070-95-R and 4072-95-R

In a brief oral ruling made on March 22,1996, I ruled that these applications cannot proceed further at this time. I also directed that the 3-way representation vote which I had previously directed in these applications be held within 5 days of the day on which the Board's staff returns to work from the strike in which it is engaged (as part of the public service strike), unless otherwise directed by the Board. In that respect, and to facilitate the taking of the vote, I also directed the parties to file their suggested vote arrangements with the Board forthwith upon the conclusion of the strike.

Further to the Board endorsements dated March 12, 1996, the L.R.O.'s designated by the Board's acting Manager of Field Services convened a meeting of the parties for the purpose of making the necessary arrangements for the 3-way representation vote ordered in these applications. Before any arrangements could be made, a dispute arose between the parties regarding when that vote should be taken. The applicants wanted the vote to take place as soon as possible, regardless of the status of the ongoing public service strike, while the responding employer and the intervenor trade union took the position that no vote should be held until that strike is over. I was called to the meeting to determine that issue and, upon hearing the representations of the parties, I ruled as aforesaid.

The situation I was presented with was a difficult one. It was (and continues to be) a situation created by a combination if of several factors which brought these applications to where they are today. The most significant of these factors is the ongoing public service strike by the OPSEU against the Government of Ontario. Among the public service employees engaging in this strike are the Board's non-managerial (or otherwise excluded) office, clerical and administrative staff, which includes the persons who process and prepare the notices, ballots and other materials necessary for a vote to take place, and the Board's Returning Officers: and the manner in which these and other applications have been dealt with by the Board since that strike began.

These two applications had developed a momentum of their own. This began with something as innocuous as an inquiry regarding the filing of materials in response to the applications, which led to exchanges between the parties and the Registrar and the Chair of the Board, and then to a teleconference on March 6, 1996 which I chaired.

No one objected to the teleconference. Indeed, all of the parties were quite content to participate in it. Further, all parties agreed that the applications should proceed further, although they disagreed on how they should proceed (i.e. the applicants argued that a vote or votes should proceed and that any hearing be held later [although they disagreed on which of the applications, which included Bd. File 4069-95-R at the time, the vote(s)

should be in] while the employer and the incumbent trade union submitted that the various issues which they had raised should be heard before a vote, if any was held). To deal with how the applications would proceed, I convened a hearing on March 11, 1996. No one objected to this hearing either. Indeed, all parties agreed that it was appropriate to deal with that question.

On March 11 & 12, 1996, I dismissed as untimely an otherwise identical application by the USWA (in 4069-95-R), directed (under s. 111(3) of the Labour Relations Act, 1995) that the applications in 4070-95-R and 4072-95-R should be treated as having been made an the same day (as they in fact were) and that those two applications proceed together for all purposes including the taking of a 3-way representation vote, directed that that vote take place before a hearing is held (if one is necessary) with respect to the issues raised in the applications, and that the parties meet with a Board Officer to make the necessary arrangements for the vote. I also directed (on agreement of the parties) that a mailing be conducted in accordance with the procedure in Paragraph 16 of Metropol Security Services [1993] OLRB Reports November 1154, and found that the voting constituency should reflect the bargaining unit agreed to by the parties. In a separate endorsement on March 12, 1996, I directed that the lists of employees filed by the employer be released to the parties prior to the Officer vote arrangements meeting.

I do not propose to try to detail the arguments made to me on March 22, 1996. In essence, the applicants said that it was essential that the vote(s) proceed, in whatever way the Board was able to carry that off, because of the size and particular circumstances of the applications and the time and expense involved in them. The applicants observed that the <u>Labour Relations Act</u>, 1995 mandates "quick and speedy" access to workplace democracy, that the magnitude of these applications heightens the need to proceed with them, and that because the <u>status quo</u> favours the incumbent trade union it is not neutral and indeed seriously prejudicial to both applicants if the Board does not do so.

The employer and Incumbent trade union wondered why it was that these applications should proceed when others are not, and on what basis the Board is determining which applications will proceed and which will not. They suggested that there is nothing which makes these applications so special that they should receive attention other applications are not getting, and that it is important that the Board maintain control over the vote process and documents.

The applicants responded that they were not prepared to let the Board "off the hook". They insisted that the Board proceed with these applications, and that the Board publicly state what it intends to do with matters which are or come before it during the strike. They submitted that the Board should proceed with all applications which are before it by modifying its processes as required in order to do so.

The concerns, either expressed or implied, of all parties are legitimate. On one hand, it is true that the <u>Act</u> provides for the speedy expression of workplace democracy through the representation vote which is now mandatory in all certification proceedings,

and it recognizes that delay in certification proceedings is undesirable. On the other hand, it is also true that these applications have proceeded to a point that others have not. Even though there are reasons for this, I can understand how this might give the appearance of special or preferential treatment.

The fact is that the Board has been directly and seriously affected by the public service strike. It is not "business as usual at the Board. Nor can it be. Never before has the Board been faced with a strike by its bargaining unit employees. Without these employees the Board cannot function. Having said that I am aware that some Board hearings which began before the strike have continued. I am aware that some new applications have been processed and some new hearings have been held (in an alleged unlawful strike application, and in applications with respect to disputes arising out of the public service strike itself). I suspect that this is no more than the Board trying to react to a situation it has no experience with. I say "I suspect" because I do not know why. I am not an administrative officer of the Board and I do not know the basis on which what happens when or where or in which case is being determined. Accordingly, I cannot comment on that. Nor can I deal with or comment on any applications other than the two before me herein.

Although difficult, the situation I was faced with was really quite simple. So far as I am aware, the Board simply does not have the ability to conduct <u>any</u> representation votes, much less in applications of the magnitude (in terms of the number of employees affected and the geographic scope of the bargaining unit) of these two. I was satisfied that these applications, and any representation vote(s) in them must remain completely in the Board's control, and that the Board cannot proceed with them until the strike is over (or its staff returns to work), and that the Board should not attempt to do so (particularly since it was common ground between the parties that what vote arrangements are appropriate may well depend on when the vote(s) is taken).

Do I think that this is a good or even acceptable labour relations result? No, I do not. But I have no legislative or supernatural powers. I cannot, the Board cannot, do something with when it hasn't the tools to do so. Is this neutral? I don't know that it isn't in a legal sense, although it may well not be neutral in a practical sense. But that is the effect of the public service strike, much like the effect in Ontario of the recent United Auto Workers strike in the United States.

In that respect, I note also that the employer (the Government of Ontario) and the trade union involved in the public service strike have entered into an Essential Services Agreement under the Crown Employees Collective Bargaining Act pursuant to which certain work and employees have been designated as "essential" and therefore exempt from the strike. Apparently, the Government of Ontario and the OPSEU do not consider what the Board does, or any part of it, to be essential because, as far as I am aware, none of the Board's work or bargaining unit employees have been designated as "essential". I doubt that I am the only one who finds it ironic that the Government and the OPSEU have nevertheless brought various matters concerning the strike before the Board.

I wish to comment on two other matters. First, the reference to "a" mailing in the first March 12, 1996 endorsement was not intended to suggest that there could or should be only one. I also note that at present there is no limit on the number of mailings, and that no party has the unilateral right to impose one. Notwithstanding the UFCWU's understandable desire that the parameters in that respect be established, I am not inclined to try to do so in the absence of any issue between the parties. Second, reasons for my earlier rulings will issue when they are ready and the Board is able to issue them, which I expect the Board to be unable to do until the strike has ended. I see no merit to the employer's assertion that a delay in that respect will prejudice it, but even if it is prejudicial, that too is an effect of the strike.

Finally, as I indicated to the parties on March 22, 1996, anyone who wishes to bring this endorsement or situation to the attention of the Registrar or the Chair of the Board, should feel free to do so.

G.T. Surdykowski, V

APPENDIX 5

ENDORSEMENT

March 31, 1996

G.T. Surdykowski, Vice-Chair

Board Files 4070-95-R and 4072-95-R

By endorsement dated March 12, 1996, I directed, among other things, that a representation vote be held in these applications and that that representation vote take place before a hearing is held (if one is necessary). I am in the process of preparing written reasons for my various decisions in these applications, including my decision directing a representation vote, and it has come to my attention that I inadvertently failed to record the requisite finding under section 8(2) of the Labour Relations Act, 1995, in that respect. Even though that finding is implicit in my decision, it should be made explicitly. Accordingly, and pursuant to the provisions of section 114(1) of the Act, I hereby amend the first March 12, 1996 endorsement (i.e., the one in which I directed the vote) by inserting the following immediately after the direction that a vote be held prior to any hearing:

In that respect, I am satisfied, on the basis of the information provided in the two applications, and the information accompanying each application under section 7(13) of the Act, that 40% or more of the individuals in the bargaining unit herein appear to be members of the United Food and Commercial Workers Union, Local 333 (Canadian Security Union) at the time its application was filed, and that 40% or more of the individuals in the bargaining unit appear to be members of the United Steelworkers of America at the time its application was filed. Accordingly, under section 8(2) of the Act, each applicant is entitled to a representation vote, which, as I have already indicated, will proceed as a three-way vote.

G.T. Surdykowski, Vice-Chair

for the Board

0014-95-R Joe White, Hank Brouwers, Paul Cyr, Applicants v. Canadian Union of Shinglers & Allied Workers, Responding Party v. Residential Roofing Contractors Association of Metropolitan Toronto et al., Intervenor

Construction Industry - Evidence - Practice and Procedure - Termination - Trade Union - Trade Union Status - Applicants seeking to terminate CUSAW's bargaining rights in connection with several roofing contractors working in residential sector of construction industry - After close of CUSAW's case, applicant moving to "nonsuit" CUSAW on ground that its own evidence failed to establish that it was a trade union within the meaning of the Act - Board explaining use of nonsuit motions and those akin to nonsuit motions in proceedings before it, and why Board considered applicant's motion without putting it to its election - Board concluding that CUSAW not an organization of employees, but rather an organization formed by, and operated for the benefit of, employers (that is, crew leaders) - Application to terminate bargaining rights allowed

BEFORE: G. T. Surdykowski, Vice-Chair.

APPEARANCES: John Moszynski and Joe White for the applicants; Michael Horan, Robert Shewell, Harold Biso and Steven Wolfreys for the responding party; Mark E. Geiger, William D. Anderson and Mario Angeloni for the Residential Roofing Contractors Association of Metropolitan Toronto et al.

DECISION OF THE BOARD; April 30, 1996

I This is a pre-Bill 7 case

1. This application was heard and determined under the *Labour Relations Act* as it was prior to November 10, 1995, the date on which Bill 7, "An Act to restore balance and stability to labour relations and to promote economic prosperity and to make consequential changes to statutes concerning labour relations", which amended the *Labour Relations Act*, among other things, was given Royal Assent. Accordingly, all references in this decision are to the *Labour Relations Act* as it was prior to November 10, 1995.

II What this case and decision are about

2. This is an application, under section 61 of the *Labour Relations Act* for a declaration that the responding party Canadian Union of Shinglers and Allied Workers (the "CUSAW") no longer represents the employees in a bargaining unit or bargaining units for which it is the bargaining agent. By decision dated September 29, 1995, the Board allowed what was in effect a "nonsuit" motion by the applicants. Having allowed that motion, it followed that the application had to be granted as well. Accordingly, the Board declared that the CUSAW was not entitled to act as a bargaining agent for or to otherwise represent the employees of Dominion Sheet Metal & Roofing Works or Chislett Roofing Ltd. (the two employers directly in issue in the application) either on the date the Canadian Union of Shinglers and Allied Workers purported to enter into voluntary recognition agreements in that respect or otherwise. Further, the Board declared that the Canadian Union of Shinglers & Allied Workers does not represent the employees of Dominion Sheet Metal & Roofing Works or Chislett Roofing Ltd. in what purport to be the bargaining units covered by the purported voluntary recognition agreements with those two employers. The following are the Board's reasons for that decision.

III The first nonsuit motion

- 3. I begin by explaining how it is that the applicants made what was in effect a nonsuit motion.
- 4. Although the application as filed referred to other sections of the *Labour Relations Act*, it was in essence an application under section 61 of the Act for a declaration that the CUSAW does not represent certain employees of Dominion Sheet Metal & Roofing Works ("Dominion") and Chislett Roofing Ltd. ("Chislett"). The CUSAW purported to be the collective bargaining agent for employees of these and certain other employers in the roofing industry, which employees are in what the CUSAW asserted were bargaining units covered by collective agreements voluntarily entered into by those employers.
- 5. Section 61 of the *Labour Relations Act* provides that:
 - **61.** (1) On application by an employee in the bargaining unit or a trade union representing an employee in the bargaining unit, the Board may declare that a trade union that was voluntarily recognized as bargaining agent for the employees in the bargaining unit was not entitled to represent them on the date on which voluntary recognition occurred.
 - (1.1) The application may be made during the first year of the period of time that the first collective agreement between the employer and the trade union is in operation or, if no collective agreement has been entered into, within one year after the date on which the voluntary recognition occurs.
 - (2) Before disposing of an application under subsection (1), the Board may make such inquiry, require the production of such evidence and the doing of such things, or hold such representation votes, as it considers appropriate.
 - (3) On an application under subsection (1), the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement. (4) Upon the Board making a declaration under subsection (1), the trade union forthwith ceases to represent the employees in the defined bargaining unit in the recognition agreement or collective agreement and any collective agreement in operation between the trade union and the employer ceases to operate forthwith in respect of the employees affected by the application.
- 6. I have previously observed that this application had some unusual aspects to it. In the Board's July 7, 1995 decision herein, for example, I commented that:
 - 4. This is far from a typical section 61 proceeding. Generally, such a proceeding simply involves an attempt by one or more employees to terminate a voluntary recognition or collective agreement between an employer and a trade union. However, this application has been brought against the backdrop of a general campaign by the Labourers' International Union of North America or one of its Locals to displace the CUSAW as the representative of persons engaged in the application of shingles and other roofing materials in new subdivisions in the residential sector of the construction industry, as defined in what purports to be a collective agreement between the CUSAW and a number of roofing contractors, in this case specifically Chislett Asphalt Roofing Ltd. ("Chislett") and Dominion Sheet Metal & Roofing Works ("Dominion") in Board Areas 8, 9, 18, 26 and 27. Further, in addition to alleging that the CUSAW is not entitled to represent the persons covered by the purported collective agreement(s), the applicants allege that the CUSAW was not a "trade union" within the meaning of the Labour Relations Act at the time the voluntary recognition agreements or collective agreements were entered into, and that it is not now such a "trade union" either, because it is an organization of or dominated by employers. In the alternative, the applicants allege that the CUSAW has received employer support from the roofing contractors, such that any agreement between the CUSAW and any such employer, specifically in this case Chislett and Dominion, should be deemed not to be a collective agreement for purposes of the Act, pursuant to section 49 of the Act.

- 5. The Residential Roofing Contractors' Association of Metropolitan Toronto (the "RRCA") has intervened on behalf of Chislett and Dominion and nine other roofing contractors listed in Appendix 1 to its intervention. In the usual section 61 case, the employer(s) and the trade union involved are allied in interest, as recognized in section 61(3) which places the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit covered by the voluntary recognition agreement at the time it was entered into on the parties to that agreement. However, in this case, the RRCA and the employers it represents in these proceedings agrees with the applicants that the CUSAW is not a trade union within the meaning of the Labour Relations Act, and also asserts that none of the agreements between the CUSAW and any such roofing contractors are collective agreements within the meaning of or for purposes of the Act. However, the RRCA disputes the allegation that the CUSAW has received any employer support as alleged by the applicants. Accordingly, while the applicants and the RRCA are allied in interest on the primary issue, they are opposed in interest on the section 49 issue raised by the applicants in the alternative.
- 7. Before the matter came on for hearing before me, another panel of the Board ruled, among other things, that the CUSAW would proceed first in the hearing on the merits of the application. Section 61(3) of the Act in effect reverses the onus which one might otherwise expect to find in an application like this one. That is, the onus in a section 61 application is on the parties which are generally in the position of responding to the application; namely, the trade union and employer parties to the challenged voluntary recognition agreement. In this application, however, the CUSAW, which purported to be a trade union, was left to defend the voluntary recognition agreements alone. Indeed, the employer parties to those agreements joined with the applicants in asserting that the CUSAW is not a "trade union" within the meaning of the Act, and that whatever the agreements in question are, they are not "collective agreements" within the meaning and for purposes of the *Labour Relations Act*. In these circumstances, it was, with respect, quite appropriate to require the CUSAW to proceed first (which it was in any event open to the Board to require in the exercise of its discretion as master of its own procedure).
- 8. The CUSAW called two witnesses. One, Harold Biso, is a co-founder and principal of the CUSAW. The other, Susan Bird, is a Vice-President of and Senior Consultant Administrator with J. J. McAteer & Associates Incorporated, a company which is in the business of providing consulting and administration services for multi-employer health and welfare, and pension plans, and which was involved with the CUSAW in that respect. When these two witnesses completed their testimony, the CUSAW closed its case.
- 9. The applicants, having previously indicated that they were likely to do so, then moved to "nonsuit" the CUSAW. Initially, this motion was framed to include the applicants' assertion that on CUSAW's own evidence taken at its highest, the CUSAW had failed to establish that it is a "trade union" within the meaning of the *Labour Relations Act*. The applicants also asserted that the CUSAW had received improper employer support such that, pursuant to section 49 of the Act, even if it was a trade union, none of its agreements with employers could be collective agreements within the meaning of the Act. The intervenors indicated that they supported the first branch of the applicants' motion. However, they maintained their position with respect of the issue raised by the second branch of the motion; that is, that there had been no improper employer support given to the CUSAW by any of them.
- 10. The CUSAW submitted that the applicants and intervenors should all be required to elect whether or not they would call any evidence, and that if any of them elected to do so (or declined to elect not to do so), the Board should refuse to entertain the motion.
- 11. Upon hearing the representations of the parties in that respect, I ruled, orally, that the Board would not hear the applicants' motion as framed by them unless all of the applicants and intervenors elected not to call evidence. However, I also ruled that I would entertain a motion in

the nature of a nonsuit without putting either the applicants or the intervenors to their election if the motion was recast to focus on what I considered to be the fundamental issue in this application, and on which issue the applicants and intervenors were allied in interest; that is, the issue of whether the CUSAW is a "trade union" within the meaning of the *Labour Relations Act*. I was satisfied that, in the circumstances of this case, it was appropriate to hear this more limited motion without putting the applicants or intervenors to their election.

IV The nonsuit motion recast

- 12. Upon hearing this ruling, the applicants, again supported by the intervenors, recast their motion to fit within that ruling. The Board then heard the representations of the parties in that respect.
- The concept of nonsuit was developed by the courts in the context of trials by judge and jury. It originated as a attempt by one party to keep the determination of the matter being litigated out of the hands of the trier of fact (ie. the jury) by persuading the trier of law (ie. the judge) that there was no case to be put to the jury. The concept that a party bringing a motion for a nonsuit is required to elect whether it will call evidence arose in this context, and as an attempt by the courts to create a situation which would be the least likely to require a retrial if the disposition of the nonsuit was overturned on appeal. Of course, even in the courts, nonsuit motions have not been restricted to trials by judge and jury. And even though the rationale for putting the moving party to its election is less compelling where the judge is the trier of both fact and law, it has been applied in those circumstances as well. Consequently, in Ontario courts, the general practice is to require a party which seeks to bring a nonsuit motion to elect whether it will call evidence, and that such a motion will be entertained (at that time) only if it elects not to do so (see, for example, Bank of Montreal vs. Horan et al., (1986) 54 O.R. (2d) 757). The Ontario courts have also developed a similar protocol for nonsuit motions in cases involving multiple parties (Brazeau Transport Inc. vs. Canfor Ltd., (1982) 38 O.R. (2d) 414).
- 14. In determining a nonsuit motion, the standard of proof applied in the courts is that of a prima facie case, and not the higher standard of the balance of probabilities. That is, the question on a nonsuit motion is whether there is any evidence which, if taken at its highest, establishes or gives rise to a reasonable inference in favour of the party responding to the motion. Any doubts in that respect are to be resolved in favour of the responding party (Hall vs. Pemberton, (1974) 5 O.R. (2d) 438 (Court of Appeal)). This is consistent with what appeared to be the court's view of how administrative tribunals should handle such motions (Ontario vs. Ontario Public Service Employees Union (1990) 37 O.A.C. 218 (Divisional Court)).
- 15. It is important to remember that the Board is not a court. The Board is different from a court both in the breadth of its jurisdiction, and in the nature of its role and what is expected of it. The Board is a statutory quasi-judicial tribunal with a specialized jurisdiction and expertise. Accordingly, although the Board's processes and hearings have some of the same characteristics as the processes and trials in the courts, there are also significant differences in that respect. These differences reflect the specialized role that the Board plays in an area in which disputes must be resolved quickly and conclusively. As a result, although every party which comes or is brought to the Board is entitled to a full and fair opportunity to make its case, the Board does not mimic what the courts do in providing that opportunity. For example, although the parties are required to plead their respective cases with sufficient particularity to identify the issues and the case which each must be prepared to make or meet, and to produce the documents upon which they intend to rely, the Board does not have a pre-hearing discovery process. Further, while the parties are obliged to prove their cases through witnesses who testify under oath, and the Board hears legal

argument which can be quite complex, Board hearings tend to be less formal or technical than civil trials.

- 16. Under the Labour Relations Act (and other employment related provisions in other legislation under which the Board has an adjudicative jurisdiction), the Board's mandate is to administer and apply the Act to matters concerning rights and obligations under the legislation. Under the Labour Relations Act, the Board is clearly the master of its own procedure, subject to specific directions in the Act itself in that respect, and the rules of fairness and natural justice. Accordingly, the Board enjoys a broad discretion with respect to the manner in which it processes and adjudicates the matters which are brought before it.
- 16. As with most things in our society, both the legislation which the Board deals with and the litigation of matters under that legislation has become increasingly complex, and concomitantly, hearings before the Board have tended to become lengthier, and more formal and legalistic. At the same time, it has become even more important that labour relations or other disputes which the Board have the jurisdiction to deal with be resolved as expeditiously as possible. As both the Board and the courts have observed "labour relations delayed are labour relations defeated and denied." In that respect, the Supreme Court of Canada has recently said that:

Unresolved disputes fester and spread the infection of discontent. They cry out for resolution. Disputes in the field of labour relations are particularly sensitive. Work is an essential ingredient in the lives of most Canadians. Labour disputes deal with a wide variety of work related problems. They pertain to wages and benefits, to working conditions, hours of work, overtime, job classification and seniority. Many of the issues are emotional and volatile. If these disputes are not resolved quickly and finally they can lead to frustration, hostility and violence. Both the members of the work force and management have every right to expect that their differences will be, as they should, settled expeditiously. Further, the provision of goods and services in our complex society can be seriously disrupted by long running labour disputes and strikes. Thus society as a whole, as well as the parties, has an interest in their prompt resolution.

Legislators have recognized the importance of speedy determination of labour disputes. By the enactment of labour codes they have sought to provide a mechanism for a fair, just and speedy conclusion of the issues.

(Dayco (Canada) Ltd. vs. National Automobile, Aerospace and Agricultural, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) et. al., [1993] 2 S.C.R. 230)

- 17. Consequently, although it has remained sensitive to the fact that it is also true that justice in haste may be no justice at all, the Board has become increasingly pro-active in its non-hearing processes and in hearings. No longer does the Board always sit mute, like some sort of labour relations sponge ever ready to absorb whatever the parties wish to throw at it for as long as they wish to do so. It is within this context that the Board's practices and policies have evolved, as a result of both the Board's experience within its specialized jurisdiction and the Board's attempts to be responsive to the changing nature and needs of labour relations or related litigation, and the needs of the community which the Board serves. In the course of developing its practices and policies, the Board has examined the utility of various doctrines and practices which have been developed in other forums, particularly the Ontario courts. In that respect, the Board has long recognized that doctrines or practices developed elsewhere are not necessarily transferable to its proceedings. Consequently, the Board has been careful to ensure that a doctrine or practice developed elsewhere is suited to proceedings before the Board, either as such or in some modified forum.
- 19. One of the concepts which the Board has borrowed from the courts and modified to suit its purposes is that of the nonsuit motion. Initially, the Board simply adopted the procedure fol-

lowed in Ontario courts and required a party moving for a nonsuit, and any parties supporting the motion, to elect whether or not it wished to call evidence (see, for example, Sun Parlour Greenhouse Growers Cooperative Limited, [1971] OLRB Rep. Nov. 743; The Board of Education for the City of Windsor, [1984] OLRB Rep. Aug. 1145; Paul Balkos, [1989] OLRB Rep. Sept. 932; Goldcrest Furniture, [1989] OLRB Rep. Sept. 967). This was consistent with what appeared to be the court's view of how administrative tribunals should deal with such motions (Ontario vs. OPSEU, supra).

- 20. However, the first look is not always the best or last one. And the Board has recently developed a different approach. Similarly, the courts have come to recognize that the differences between them and administrative tribunals may justify a different approach to such motions by the latter (*Metropolitan Toronto vs. The Joint Board et al*, [1991] 6 O.R. (3d) 88 (Divisional Court)). The Board has taken a second look at how a nonsuit motion should be dealt with in its proceedings. In the result, and recognizing the discretion it clearly has in that respect, the Board has become more receptive to the notion of a nonsuit motion without an election. Indeed, the Board has occasionally invited such motions itself (see, for example, *Boise Cascade Canada Ltd.*, [1989] OLRB Rep. May 413; *Hurley Corporation*, [1992] OLRB Rep. May 582 and Aug. 940; *Kenneth Edward Homer*, [1993] OLRB Rep. May 433; *Covington Clarke*, [1994] OLRB Rep. June 649; *The Great Atlantic & Pacific Company of Canada Limited*, [1994] OLRB Rep. Aug. 1127; *Arthur Chen*, [1994] OLRB Rep. Sept. 1184).
- The Board's approach in that respect is not inconsistent with fairness or natural justice. An application or complaint which appears to be going nowhere should be brought to an end, unless the Board can be persuaded that appearances notwithstanding there is some real possibility that the applicant/complainant may succeed, particularly in a time of scarce resources and in circumstances where the Board has no costs jurisdiction pursuant to which a party responding to a fruitless case can be compensated accordingly (with respect to that latter point, see Bellai Brothers Ltd., [1994] OLRB Rep. Jan. 2). The fact that the Board entertains or invites a nonsuit type of motion without an election does not mean that the Board has already decided the issue. What it indicates is that the Board is concerned that a party which bears the onus with respect to an issue which is dispositive of the application or complaint before the Board, and which has closed its case, has not made out a prima facie case in that respect, and that the Board wants the benefit of the submissions of the parties in that regard. In effect, a party which finds itself in a position of responding to such motion must "show cause" why the matter should proceed further, or to put it more directly, why the matter in issue should not be decided against it. In that respect, I note that the Board will only entertain or invite such a motion where the party which bears the onus in the matter before the Board (or an issue which is determinative of it) has had a full opportunity to present its evidence. It should come as no surprise that the Board engages in a continuous assessment of evidence in the matter before it as the case is presented. Indeed, this is something which the Board must do in order to be able to conduct hearings properly. Having engaged in such an assessment, and bringing its labour relations expertise to bear upon it, the Board is in a position to consider whether it is appropriate to entertain or invite a nonsuit type of motion when the party bearing the onus has closed its case. Fairness and natural justice require that a party have a full opportunity to present its case. A party which has failed to present a case which requires an answer is not entitled to say that it may be able to find something in evidence that another party may call. Nor does fairness or natural justice preclude the kind of ongoing assessment and application of its expertise by the Board to a case as it unfolds in a hearing, which may lead to a nonsuit motion. As a former Vice-Chair of the Board once observed, the parties are entitled to an adjudicator with an open mind, not an empty one.
- 22. I note that this approach is consistent with the manner in which the Board has exercised

its power to consider whether an application or complaint filed with it discloses a *prima facie* case. The Board routinely examines applications or complaints made to it for the purpose of assessing whether the party bringing the application or complaint has pleaded a *prima facie* case for relief which is within the Board's jurisdiction to grant. If the Board is satisfied that an application or complaint does not do so, the Board will dismiss it on its own motion without processing it or putting anyone to the expense of dealing with something which cannot possibly succeed. Of course, the Board will also entertain a motion to dismiss for failure to plead a *prima facie* case from a responding party, either in writing prior to any hearing or at a hearing.

- I am also aware of the debate between labour relations arbitrators about the use and practice of nonsuit motions in arbitration proceedings. Some arbitrators have sought to facilitate such motions by drawing a distinction between motions based on "no evidence" and motions based on "insufficient evidence". In *Canada Post Corporation and CUPW (Musson)*, (1994) 34 L.A.C. (4th) 36, for example, the arbitrator ruled that a party moving for nonsuit would not be put to its election if it is asserting "no evidence", but would be if it was asserting "insufficient evidence", the latter being something it could only do after it has closed its case. In *General Tire Inc. and United Rubber Workers, Local 536*, (1992) 24 L.A.C. (4th) 234), the arbitrator held that it was within his discretion to allow a nonsuit motion to proceed without putting the moving party to its election, and that the proceeding before him was an appropriate case in which to do so.
- Other arbitrators have required a party moving for a nonsuit to elect not to call evidence before they would entertain the motion (*Re. Canadian Broadcasting Corporation*, (1992) 24 L.A.C. (4th) 250; *Canadian Airlines International Ltd. and CUPE*, (1994) 38 L.A.C. (4th) 160). In *Canadian Airlines International Ltd.*, *supra*, the arbitrator rejected the distinction between "no evidence" and "insufficient evidence" on the basis that in all cases where nonsuit is moved the moving party is asserting that there is no case for it to meet. With respect, I agree. The proper test is the one applied by the courts in nonsuit motions; that is, does the evidence presented by the responding party (generally the plaintiff in the courts) makes out a *prima facie* case for judgement for that party. This does not mean that the evidence of the party responding to the motion must be accepted as being true. While a party should be given the benefit of any doubt, taking its evidence at its highest does not require that evidence which a patently untrue or unreliable has to be accepted. Nor does it require that every inference drawn be favourable to the party. If the only reasonable inference to be drawn is a negative one, it is appropriate to do so.
- 25. The distinction which has been drawn between "no evidence" and "insufficient evidence" demonstrates the difference between what is and what is not properly a nonsuit motion. A nonsuit motion is in effect a "no evidence" motion; that is, the moving party asserts that the party which has the onus in the proceeding (or which has the onus with respect to an issue which if decided against it would be dispositive of the proceeding), having had a full and fair opportunity to do so, has failed to make out a *prima facie* case for the relief it seeks; that is, that, on its own evidence, there is no reasonable possibility that the party responding to the motion can succeed. That is the test applied in nonsuit motions before the Board.
- 26. However, the arbitrator in Canadian Airlines International Ltd., supra, went on to say that if a party moving for nonsuit is not put to its election a ruling on the motion will give it an unfair advantage because it will obtain an opinion with respect to the sufficiency of the case against it while it still has an opportunity to call its own evidence. With respect, the arbitrator in that case fell back upon the very distinction which he had rejected, and with that I respectfully disagree. It does not necessarily follow that a party will get an indication of the sufficiency of the evidence or case of the party opposite, except in the sense that it will obtain a ruling on whether there is any case at all which it must answer. It is difficult to see how this creates an unfairness. The prima facie

test applied in a nonsuit motion is a lower threshold, from the perspective of the party responding to such a motion, than the balance of probabilities test which is applied when evidence is being weighed in Board and arbitration proceedings. Accordingly, a party could present a *prima facie* case but fail to persuade on a balance of probabilities. Further, whether or not the disposition of a nonsuit motion may create an unfairness is something which can be assessed in a particular case, and is something which is properly taken into account in determining whether it is an appropriate exercise of discretion to put the moving party to its election. In the Board's experience, unfairness will not necessarily result if a moving party is not put to its election. On the contrary, a nonsuit motion without an election can be a useful discretionary tool for ending futile labour relations litigation.

- 27. The Board's experience has resulted in the Board becoming more receptive to the notion of nonsuit motions being allowed to proceed without an election. This is reflected in the Board's recent jurisprudence in that respect.
- 28. Hurley Corporation, supra, for example, was an application for certification in which the applicant trade union sought to nonsuit the group of objecting employees which had filed a timely petition opposing the application (at a time when such things were relevant) by bringing a motion in that respect at the conclusion of the group of employees evidence with respect to the origination and circulation of their petition. The Board entertained the motion without putting the trade union to its election. In its reasons in that respect, and even though there was no issue between the parties with respect to whether the trade union in that case should have been put to its election, the Board wrote that:
 - 6. The Board is satisfied that it has a discretion to decide whether or not to put a party making a motion for nonsuit to its election, prior to entertaining the motion itself. Provided its discretion is exercised in a fair manner, consistent with natural justice, the Board is entitled, in given circumstances, to decline to put a party to its election. In this regard, the Board will no doubt consider all of the circumstances, including the need for fair, efficient, and expeditious proceedings before the Board. In our view, fairness and natural justice do not demand that, in every case, the moving party must make its election. To so conclude would be to fetter our discretion, in an area where the Legislature has not indicated that the civil court rules or practices ought to apply. It would be inconsistent as well with the Board's general authority, in section 104(13) of the Act, to "determine its own practice and procedure" provided it gives full opportunity to the parties to any proceedings to present their evidence and to make their submissions.
 - 7. Returning to the facts of the instant case, the only issue being litigated before the Board was the voluntariness of the petition filed by the petitioners in opposition to the certification application. The petitioners proceeded first with their evidence, to be followed by the company, and then the union. After the evidence of the petitioners had been led, and after the company indicated it did not have any evidence to call, the union made a motion for nonsuit, arguing that the petition ought to be dismissed as it was clearly involuntary. Thus, the petitioners, who had the onus of establishing the voluntariness of their petition, had proceeded first, they had led all their evidence, and the employer had been given an opportunity to lead any evidence it wanted.
 - 8. When the union brought its motion, it asked that it not be put to its election prior to being allowed to argue the merits of the motion for nonsuit. The company supported the union's request that it not have to elect. The petitioners did not take a position on the requirement of an election. They did not suggest that the election had to be made. In short, no party was asking that the union be put to its election.
 - 9. In these circumstances, where it might significantly delay the resolution of matters, to the detriment of sound labour relations in the workplace, and given that the other parties did not request that the election be made, the Board decided not to require the union to elect whether it wished to call evidence before hearing its motion.
 - 10. Our decision was context specific, based on the the circumstances and facts before us. In

response to the union's request, and given the parties' positions, it appeared both fair and sensible to allow the union an opportunity to argue in essence that there was no case for it to meet, before requiring all the parties to engage in further, extensive litigation.

- 11. The Board might well on its own initiative adopt such an approach. (see O'Brien, J. comments in *Metropolitan Toronto, supra*, p.5). All parties must, of course, be treated fairly and have full opportunity to lead their evidence and make submissions. Consistent with this, however, there will be proceedings where there is no useful purpose served by requiring a party opposite in interest to lead its evidence when the evidence of the party having the onus is clearly insufficient to meet that onus. The Board might call upon the parties to make submissions or otherwise conduct the balance of the proceedings in a manner that will not unduly delay the resolution of the labour relations dispute. In such circumstances, to force all the parties to incur additional expense and delay, when there is no reasonable likelihood of success in the issue, may not be consistent with sound labour relations principles or with sound administrative tribunal practice.
- 29. In Kenneth Edward Homer, supra, the Board followed the approach in Hurley Corporation, supra, and entertained a nonsuit motion by one of two responding parties without requiring it or the other responding party to elect whether they wish to call evidence. Covington Clarke, supra, was one of a number of cases in which, at the conclusion of the applicants' case, the Board itself called upon the parties to make submissions with respect to whether the matter should proceed any further, in effect inviting a nonsuit motion in circumstances where it appeared to the Board that the applicants' evidence was so wanting that it might be appropriate to terminate the proceedings.
- 30. In short, whether the Board will exercise its discretion to invite or allow a nonsuit motion to proceed without putting the moving party to its election will depend on the circumstances and the Board's assessment of the situation in the case in which the issue arises.
- 31. As I have already noted, section 61 places the statutory onus on the parties to an alleged collective agreement to establish certain facts. In this case, it was alleged that the CUSAW, the purported trade union party to the alleged collective agreements, was not in fact a "trade union" within the meaning of the *Labour Relations Act*, something which is often not an issue in proceedings under section 61. Because there had never been a Board finding that the CUSAW was in fact a "trade union" the onus was on the CUSAW to establish that it was.
- 32. This issue was fundamental to the application because if the CUSAW could not establish that it was a trade union, the agreements upon which it relied could not be collective agreements within the meaning of the *Labour Relations Act*, and could not have created the bargaining rights attacked in the application in the first place. I found it appropriate to entertain the applicants' nonsuit motion as recast because I had serious doubts concerning the CUSAW's evidence on that issue when it closed its case, and the determination of the motion against the CUSAW would be dispositive of a case which would otherwise have required many more days of hearing spaced over several months to conclude.

V Decision on the nonsuit motion

- 33. The test which I applied was the same one applied by the courts in such motions; that is, whether taking the evidence at its highest, and drawing all the reasonable inferences most favourable to the CUSAW from that evidence, had the CUSAW made out a *prima facie* case for status as a "trade union".
- 34. For a period of time, trade unions (other than the few which have incorporated) were considered to be unincorporated associations whose legal existence and characteristics are essentially those of a club; that is, voluntary associations which apart from their members have no exis-

tence recognized by law. Those who favoured that view pointed to a decision of the Ontario Court of Appeal in Astgen vs. Smith, [1970] 1 O.R. 129 in support of the proposition.

- In law, a club is no more than a group of individuals who have joined together in the pursuit of specified common objectives, and whose relations to each other are regulated by a complex of individual contracts between each member and every other member, which complex of contracts is described in the constitution, by-laws and other rules or regulations to which they have all agreed. While trade unions may have some of the same characteristics as clubs, they are not, with respect, merely a form of club. Astgen vs. Smith, supra, rejected the proposition that trade unions have some sort of special or hybrid status, and also the notion that there is a contract between the trade union as such on one hand and its individual members on the other, the latter on the basis that a trade union lacks the legal capacity to contract. However, even in that case, the Court of Appeal specified that that was the case outside of the purview of labour relations legislation, and it is labour relations legislation which gives trade unions status and capacity as entities in their own right, including the right to enter into certain kinds of contracts, which clubs do not possess.
- 36. Prior to the legislative precursors to statutes like the *Labour Relations Act*, trade unions were generally considered to be unlawful combinations of employees in restraint of trade. Even today, without or outside of the *Labour Relations Act* or similar legislation, the activities of trade unions would be quite restricted. It is doubtful, for example, that effective collective bargaining could exist outside of the labour relations legislative scheme.
- 37. In section 1(1) of the *Labour Relations Act*, "trade union" is defined as:

"trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

(emphasis added)

The vestiges of any common law existence or characteristics are quite unimportant in a modern trade union. Today, it is the legislative scheme which gives life and vitality to trade unions, and which makes trade unions an important part of the labour relations fabric of this province. Under the Labour Relations Act, for example, trade unions have an existence, and a (limited) ability to contract which is independent of their members or the employees they represent. The distinction between members and represented employees is an important one. For example, under the Labour Relations Act (and also under other labour relations legislation in Ontario), trade unions are separate and distinct legal entities with rights, duties and obligations of their own. It is trade unions, and not employees or entities which are not trade unions, which can obtain and enforce collective bargaining rights. It is trade unions, not the employees they represent, which are entitled to require employers to bargain collective agreements and which are parties to those collective agreements in their own name, with the concomitant right to administer and enforce those collective agreements. On the other hand, trade unions have obligations as well. Regardless of anything which may be contained in a trade union's constitution or by-laws, it is obliged to represent all employees (not just its members) in the bargaining unit(s) for which it is the exclusive bargaining agent, and the trade union is obliged to allow all employees (not just its members) to participate in strike or ratification votes. The separation between bargaining unit employees and the trade union which represents them is underscored by a number of provisions in the Act, including the separate provisions prohibiting unlawful strike activity by employees and trade unions.

38. In addition, a trade union (and its employer(s) collective bargaining partner(s)) is obliged to file a copy of its collective agreement(s) with the Minister, may be required to file a

copy of its constitution and by-laws, and a list of its officers with the Board, is required to furnish any member who requests one with an audited financial statement, and is obliged to file with the Board the name and address of a person in Ontario who is its representative for service for purposes of processees and notices under the Act.

- 39. In short, under the *Labour Relations Act*, a trade union is an organization of employees but one which once formed, has an existence which is not congruent with the employees who formed it, and which has the rights and obligations of a separate legal entity for purposes of the Act.
- 40. Further, except perhaps at their inception, trade unions are rarely voluntary organizations in any common law sense. A trade union can obtain and retain bargaining rights so long as it is able to demonstrate the requisite support among bargaining unit employees. Once a trade union obtains such rights, it is the exclusive bargaining agent for all of the employees in the bargaining unit, including any minority, however large, which opposed it or does not want it, and for any new employees. Subject to the religious exemption provisions, the Act permits provisions which require bargaining unit employees to become members of the bargaining unit which represents it, or to pay union dues even if they are not members and whether or not the employees wish to do so. Further, a trade union's status as bargaining agent does not depend upon the continuing support of bargaining unit employees, or the continued employment of employees whose support led to its obtaining bargaining rights in the first place. Much like a government which does not lose its authority until it is defeated in an election, a trade union continues as the exclusive bargaining agent for employees for which it has obtained bargaining rights until such time as those bargaining rights are terminated in accordance with the *Labour Relations Act*, regardless of its popularity in the bargaining unit.
- 41. In short, the *Labour Relations Act*, like other labour relations legislation, defines and regulates the existence of a collective bargaining relationship between employers, trade unions and the employees which trade unions represent, which is quite different from the common law notions of club law or agency. A trade union is more than merely the sum of its members, or even of the employees it represents.
- 42. There are two characteristics which are fundamental to the existence of a trade union, and which reflect the fundamental elements of the *Labour Relations Act*. First and foremost, a trade union must be an "organization of employees". This reflects the fundamental separation in the Act between employers and employees. Second, its purposes must include "the regulation of relations between employers and employees". This reflects the principle of representation and collective bargaining. The issue in this case was whether the CUSAW was an "organization of employees formed for purposes that include the regulation of relations between employees and employers". The evidence in that respect reveals the following.
- 43. On April 28, 1993, Rob Shewell, Steve Wolfreys, Harold Biso, Peter Cowie, and Wayne Rogers, together with Michael Horan (a solicitor and the CUSAW's counsel herein) convened a "founding" meeting. The minutes of that meeting are as follows:

Present:

Rob Shewell Steve Wolfreys Harold Biso Peter Cowie Wayne Rogers

Also Present: Michael G. Horan

The meeting opened with a discussion amongst the employees present regarding the merits of establishing a trade union within the meaning of *The Labour Relations Act* in order to secure the right to bargain with employers. The employees discussed a Constitution which had been prepared by Michael G. Horan and distributed prior to the meeting. The employees then discussed certification requirements as well as the requirements of the Ontario Labour Relations Board with respect to the proof of the status of an organization as a trade union within the meaning of the *Labour Relations Act*. After a lengthy discussion about an appropriate name a motion was made by Harold Biso and seconded by Robert Shewell that the employees present constitute themselves as a trade union to be known as **CANADIAN UNION OF SHINGLERS & ALLIED WORKERS** ("the Union") in order to regulate *inter alia* wages, fringe benefits, working conditions and labour relations with employers. The motion was unanimously carried.

The employees present then reviewed the Constitution which had been discussed and amended earlier in the meeting. At the conclusion of the discussion it was moved by Peter Cowie and seconded by Steve Wolfreys that the Constitution be approved. The motion was unanimously carried.

Immediately, a meeting of CANADIAN UNION OF SHINGLERS & ALLIED WORKERS was convened. There was discussion about membership requirements generally as well as the methods to be used to organize other employees. There was also discussion about the prospects of mandatory membership under any contract negotiated. There was discussion also about the prospect of creating locals of this union and the feasibility of doing so particularly in respect of metalmen and siders. Those persons present applied for membership in the Union. At that time application for membership cards in the form annexed hereto as Schedule "A" were signed, countersigned, dated and receipts were furnished to those persons who applied for membership. There was a discussion about getting cardboard membership cards printed.

It was then moved by Harold Biso and seconded by Wayne Rogers, that the new members of the Union ratify the Constitution as approved previously. The motion was carried unanimously by a vote of the members.

It was then moved by Harold Biso and seconded by Steve Wolfreys the [sic] Robert Shewell act as Chairman of the first meeting pending election of the officers of the Union in accordance with the Constitution. The motion was carried unanimously.

The meeting was then opened for nomination of elected officers. Nominations for the office of President were opened and it was moved by Steve Wolfreys and seconded by Peter Cowie that Robert Shewell be so nominated. There were no further nominations and Robert Shewell having accepted the nomination, he was therefore acclaimed President.

Nominations for the office of First Vice President were opened and Harold Biso was nominated by Robert Shewell which nomination was seconded by Peter Cowie. Harold Biso accepted the nomination and there being no further nominations, he was acclaimed to be First Vice President of the Union.

Nominations for the office of Second Vice President were opened and Peter Cowie was nominated by Robert Shewell which nomination was seconded by Steve Wolfreys. Peter Cowie accepted the nomination and there being no further nominations, he was acclaimed to be Second Vice President of the Union.

Nominations for the office of Secretary were opened and Steve Wolfreys was nominated by Wayne Rogers which nomination was seconded by Robert Shewell and Steve Wolfreys having

accepted the nomination and there being no further nominations, he was acclaimed to be Secretary of the Union.

Nominations for the office of Treasurer were opened and Wayne Rogers was nominated by Robert Shewell which nomination was seconded by Peter Cowie. Wayne Rogers accepted the nomination and there being no further nominations, he was acclaimed to be Treasurer of the Union.

All of the Executive Board offices of CANADIAN UNION OF SHINGLERS & ALLIED WORKERS were now filled and those persons on the Executive Board who were present at the meeting took the following oath of office, read to them by Michael Horan:

"I, these witnesses that I will to the best of my ability perform the duties of my office and I will at all times devote my best efforts to further the objectives and best interests of the Union."

The employees then proceeded to have a further discussion with respect to a number of worker concerns including membership, dues, organizing including groups to be sought ie: commercial and excluding re-roofing, employer resistance and bargaining for a collective agreement.

It was moved by Steve Wolfreys and seconded by Harold Biso that the meeting be adjourned at 11:55 a.m.

The aforesaid minutes have been read by the persons hereinafter set forth and are verified by them as being a true and correct account of the proceedings of the meeting on the date, time and place aforesaid.

"ROB SHEWELL"
Rob Shewell

"STEVE WOLFREYS"
Steve Wolfreys

"HAROLD BISO"
Harold Biso

"PETER COWIE"
Peter Cowie

"WAYNE ROGERS"
Wayne Rogers

- 44. The constitution referred to in the April 28, 1993 minutes stipulates that the CUSAW's objects are:
 - (a) The regulation of relations between employees and their employers;
 - (b) The negotiation of written agreements with employers containing provisions respecting terms or conditions of employment of employees;
 - (c) The promotion of improved terms and conditions of employment for employees through collective bargaining;
 - (d) The establishment of effective means of ongoing communications between employees and their employer;
 - (e) The promotion of the interests and unity of employees generally.

Further, the constitution provides that membership is open to persons employed in any trade or occupation, and stipulates that there will be 5 officers who will in turn comprise the organizations executive board which is authorized to run it. With the exception of the eligibility restrictions for the office of the president, the constitution's provisions are rather "boiler plate" in nature.

45. The events which led up to the "founding" meeting, in the context of the roofing industry, are significant (and not really in dispute). In that latter respect, I accepted, as I was obliged to

- do, Mr. Biso's evidence as being representative of how the industry operates. Indeed, significant portions of his testimony dealt with what he described as "standard" practices in the industry.
- Mr. Biso testified that in the Spring of 1993, there were ongoing discussions about forming a trade union because "they" wanted an enforceable agreement with what Mr. Biso referred to as "management". He said that by the end of April 1993, "the men wholeheartedly wanted to go ahead with a union." Hence the April 28, 1993 meeting.
- But the CUSAW was not the first such organization. Although there is no cogent evidence regarding the events which led up to it, the Canadian Shinglers Association Inc. (the "CSA Inc.") was incorporated on May 26, 1981. Messieurs Biso and Shewell were officers of that corporation. Messieurs Rogers, Cowie and Wolfreys were also involved with it, and while it is not clear, it is reasonable to infer from the evidence that the latter three were also officers, but it was apparent that this group of five played key roles in it. The CSA Inc. was dissolved by order dated January 27, 1987 for failing to comply with the *Corporations Information Act*.
- 48. In 1988, the intervenor Residential Roofing Contractors' Association of Metropolitan Toronto, on its own behalf and on behalf of twelve individual contractors, including Dominion and Chislett, applied to the Board for, among other things, a declaration "that a strike engaged in by employees of [theirs] is unlawful." The CSA Inc. and Messieurs Rogers, Cowie, Shewell, Biso and Wolfreys, all of whom were crew leaders at the time, were named as respondents. In a reply filed on their behalf by counsel (Mr. Horan) in that proceeding, the individual respondents specifically stated that they were not "employees" within the meaning of the *Labour Relations Act*.
- 49. In settlement of those Board proceedings, the Residential Roofing Contractors Association of Metropolitan Toronto, the CSA Inc. (notwithstanding that it no longer existed as a corporate entity), twelve roofing contractors (including Dominion and Chislett), and Messieurs Cowie, Rogers, Wolfreys, Shewell and Biso, (the latter five individuals being identified in the agreement as the executive of the CSA Inc.) entered into a written agreement dated August 24, 1988 intended to govern the relations between them. This agreement does not appear to be, and has never been asserted by anyone to be, a collective agreement. Indeed, words like "union", "employee" and "employment" are conspicuous by their absence in that agreement.
- Subsequently, by Letters Patent dated July 21, 1989, the Metropolitan Toronto Shinglers' Association (the "MTSA") was constituted as a non-profit corporation without share capital. The applicants for the Letters Patent and the first directors of the MTSA were Messieurs Shewell, Rogers and Wolfreys. The objects of the MTSA were:
 - To provide guidance and assistance to persons engaged in residential shingling, particularly with respect to matters of employment.
 - 2. To negotiate and enter into written agreements containing provisions respecting terms and conditions relating to the supply of labour.
 - 3. To promote the best interests of persons engaged in residential shingling.

The MTSA's By-law No. 1 is unremarkable for a non-profit, non-share corporation, but certainly does not suggest that it is an organization of employees or that one of its purposes is to regulate relations between employees and employers. Further, By-law No. 7 of the MTSA provides that:

Crew leaders shall be authorized and directed to hire only persons who are members in good standing of the Association. Failure by a crew leader to ensure that a person hired is a member in good standing shall constitute a serious violation of this By-law and shall be dealt with in accordance with the provisions of By-law No. 6.

- 51. The MTSA carried and continues to carry on its business as and under the name Canadian Shinglers' Association. It continues to exist. Its directors are the same five individuals who were the executive of the CSA Inc., and who formed and are the officers of the CUSAW.
- No one, including Mr. Biso, or any of Messieurs Cowie, Rogers, Shewell and Wolfreys, or Mr. Horan, their counsel throughout, ever considered either the CSA Inc. or the MTSA to be a trade union, and no one ever considered the 1988 agreement to be a collective agreement. Indeed, more than once in correspondence with J. J. McAteer & Associates Mr. Horan specifically stated that the CSA Inc. (the MTSA c.o.b. as the CSA at the time) was not a trade union. Indeed, in a letter dated November 22, 1989 in that respect, Mr. Horan wrote that:
 - 4. There is no procedure for registration with the Labour Relations Board other than an Application for Certification wherein status is sought as a trade union. I personally do not believe that the group as presently constituted would qualify as a trade union. Subject to the loss of status of the previous corporation I believe that the Memorandum of Settlement is enforceable at the Labour Relations Board.
- Against this background, Messieurs Biso, Rogers, Shewell, Wolfreys and Cowie tried to improve their situation by forming the CUSAW in 1993. As Mr. Biso put it, they decided to "legitimitize" themselves. To accomplish this, they formed the CUSAW at a meeting held on premises owned by the MTSA on April 28, 1993. The question before me in this case was what they created; that is, the CUSAW, a "trade union". I was satisfied that it was not.
- 54. By letter dated May 31, 1993, Mr. Biso advised Ms. Bird that "effective April 21, 1993 [sic] the Metropolitan Toronto Shinglers' Association has officially *changed its name* to the Canadian Union of Shinglers and Allied Workers" (emphasis added). That accurately describes what had in fact happened. That is, the CUSAW is no more than another name for the MTSA, which was itself a continuation of the CSA Inc. The status of the CSA Inc. and MTSA has never been in doubt or in issue. Neither was a trade union. No one, including Mr. Biso, thought that either one was. There is no difference between the CUSAW and the MTSA c.o.b. CSA, or even the original CSA Inc. Like the other two, the CUSAW is an organization created and operated by and primarily for the benefit of crew leaders. It is apparent that the five individuals who operate and control the MTSA and the CUSAW (ie. Messieurs Biso, Rogers, Shewell, Wolfreys and Cowie) have long been aware of the issue of the status of crew leaders under the *Labour Relations Act*. In the same November 27, 1989 letter that I quoted from above, their counsel wrote that:
 - 3. I have had numerous discussions with the group with respect to their status and there has always been some real question in that regard. I recently sent Mr. Shewell a copy of a decision from the Ontario Labour Relations Board which indicated that if there are more than two persons in a carpentry crew of piece workers that the persons are not employees within the meaning of the Labour Relations Act. That decision confirms the real question the status of "crew leaders" that I have been wary of from the beginning.
- 55. That is, counsel was quite rightly concerned that crew leaders would be considered to be "employers", not "employees". It was clear on the evidence before the Board in this case, that "crew leaders" are employers.
- The industry with which I was concerned in this case is that of new roofing on low-rise residential buildings, primarily in subdivisions. There are many organizational similarities between this industry and the low-rise residential carpentry industry which has been described in *E. M. Carpentry (1982) Limited*, [1989] OLRB Rep. Aug. 830 (and which it appears was the decision being referred to by Mr. Horan in the excerpt from his November 27, 1989 set out in paragraph 54 above).

- 57. In both industries, contractors (in this case roofing contractors like Dominion and Chislett) obtain work on new low-rise residential units from "builders". Generally, the contractors engage the services of others on a piecework basis. Most of these pieceworkers have "helpers" who work as a "crew". In this case, the pieceworkers are generally known as "crew leaders" and their helpers are called "crew members". The evidence revealed the following about the relationship between contractors, crew leaders and crew members.
- The size and make-up of crews varies. The individual crew leaders operate either as such in their own name or under a business name. At least seven have incorporated companies. It seems that there are some crew leaders who work alone (in which case they lead only themselves) and a few have the help of only one crew member. However, it appeared on the evidence before the Board that the vast majority of crew leaders have two or more crew members, and that it is not unusual to find crews of five or more crew members. In April 1995, for example, Mr. Cowie had ten crew members on his crew, and Mr. Shewell had nine crew members, Mr. Wolfreys had seven crew members, and Mr. Rogers had one crew member. It is not clear what Mr. Biso's crew looked like at that time but it was usual for him to have at least 3 or 4 crew members on his crew.
- It appears that crew leaders who use crew members have a regular core of them upon which they rely. Mr. Biso, for example, has a core crew of three crew members (Neil Young, Shawn McCaffrey and Steve Halsted), but his crew averages five crew members, sometimes expanding to as many as eight or nine. Mr. Biso has had twelve to fourteen different crew members over the years. Crew leaders obtain work for their crews, either when contractors call them to offer them work, or by soliciting contractors for work. Crew leaders may have a relationship with one or more contractors such that they regularly obtain work from them, but it is clear that they can and do work for whichever contractor(s) they wish. For example, Mr. Biso worked for at least nine contractors in 1994. Although crew members occasionally approach contractors for work directly, this appears to be rare and only after consulting with a (usually their) crew leader first. Generally, crew members obtain work by approaching crew leaders. While crew leaders are free to work for more than one contractor at a time, or within the same week on the same builder's site (as Mr. Biso testified he had done), crew members typically work for one crew leader at a time.
- Although contractors may have some input, it is the crew leaders who decide what size of crew they will operate and who their crew members will be. The influence of contractors in this respect appears to be limited, and such as it is seems typical of the kind of influence contractors have with sub-contractors in the construction industry. Similarly, while contractors do have site foremen who oversee the work of crews in a general way, again in much the same way as many contractors supervise their sub-contractors in the construction industry, it is the crew leaders who run their crews and directly supervise the work of their crew members. Similarly, while contractors may sometimes express dissatisfaction with crew members, it is apparent that it is the crew leaders who exercise that kind of quality control. In Mr. Biso's case, for example, a contractor expressed dissatisfaction with one of his crew members who was alleged to have been drinking on the job and who was subsequently in effect discharged by Mr. Biso, who said he didn't call that individual into work any more. However, it is apparent that the real reason that Mr. Biso let that individual go was the poor quality of his work which (as we shall see below) was costing Mr. Biso money.
- 61. Indeed, although crew members may occasionally deal directly with contractors with respect to various things, it is apparent that it is the crew leaders who deal with contractors with respect to all matters relating to their employment concerns. For example, when crew leaders obtain work from a contractor, they are assigned the houses which they are to roof by that contractor, but the crew leader decides how and by whom the work is to be done. The crew members themselves are paid on a piecework basis. They are assigned work by their crew leader, in accor-

dance with their ability as assessed by the crew leader. Crew members report their work to the crew leader who completes the "book in" sheet which is submitted to the contractor for payment. Contractors who are bound to it pay crew leaders for work performed in accordance with piecework rates established under the agreement which was alleged to be a collective agreement. The amount that crew members are paid is determined by the agreement that the individual crew members are able to negotiate with their crew leader and which varies between 85% and 100% of the specified installation rate in the agreement the CUSAW has with roofing contractors. Mr. Biso testified that 85% is the minimum rate for crew members, and while that may be the case for his crew members and perhaps generally, I observe that it appears to be a kind of "rule of thumb" since there is nothing in the agreement, or anywhere else in the evidence before the Board, which specifies such a minimum. Further, on Mr. Biso's crew, and on every crew he worked on as a crew member before he became a crew leader, it is the crew leader who is paid for the "extras" done by the crew, regardless of who actually does the work.

- 62. Crew leaders and their crews are paid by contractors on either a "single cheque" or a "multi-cheque" system. In the single cheque system, the contractor pays the amount it considers to be due (which is the amount "booked in" by the crew leader less any adjustments for "deficiencies" which may have been corrected by the contractor's direct employees or to the rates applied by the crew leaders) to the crew leader in a single cheque. The crew leader then dispenses the amount he calculates as due to each of his crew members and keeps the balance for himself. It was clear from Mr. Biso's evidence, which I had to take as being representative of crew leaders generally, that because of adjustments this balance is occasionally zero or negative, in which case the crew leader has to make up the amounts owing to his crew members out of his own pocket. The only real difference between this and the multi-cheque system is that the contractor issues individual cheques to the crew leader and each crew member on his crew. Even then, however, it is the crew leader who determines the amount of each crew members cheque and the crew leader bears the same risk of loss as he does under the single cheque system.
- Although crew leaders generally also work with the tools (ie. apply roofing materials themselves), they do not always work with their crews. Even when they don't, and the crew members perform all the work, crew leaders continue to receive a percentage of the piecework rate specified in the agreement between CUSAW and the roofing contractors and the "extras". In the case of the five crew leaders who constitute the executive of the CUSAW and its precursor organizations (ie. Messieurs Cowie, Shewell, Rogers, Wolfreys and Biso), for example, they continue to profit (or lose) from the work performed by the respective crews while they are attending to the affairs of the CUSAW (or the MTSA, as the case may be). I note that they were also compensated by the CUSAW (or the MTSA) in that respect. (For example, in 1994 Mr. Shewell received over \$31,000.00 in "wages" from the CUSAW or the MTSA c.o.b. as the CSA.)
- Mr. Biso's income tax returns for 1993 and 1994 were in evidence before the Board. (Notwithstanding the intervenor's requests that other income tax returns, specifically those of Mr. Shewell, be produced, only Mr. Biso's were produced and was in evidence before the Board. In fact, I ruled that the CUSAW need not produce Mr. Shewell's returns. In retrospect, I think that Mr. Shewell's income tax returns should have been produced and admitted in evidence as such. However, nothing turns on this given that I drew the inference that Mr. Shewell's returns would not have assisted the CUSAW, and also my determination of the nonsuit motion and application.) For 1993, Mr. Biso filed his income tax return as a self-employed person. His 1993 return shows business income, no employment income, and his deductions include typical business expenses (meals and entertainment, rent and office expenses, and the use of a motor vehicle, for example). The same is true of Mr. Biso's 1994 income tax return, except that he shows a small amount (\$17.28) of employment income, which on the evidence was from the CUSAW welfare fund. In

addition, on both returns, Mr. Biso calculated a Canada Pension Plan Tax Credit Contribution payable on self-employment earnings. On his evidence, these income tax returns reflect Mr. Biso's earnings in the roofing industry in 1993 and 1994.

- I was satisfied that crew leaders effectively hire, assign work to, supervise, discipline, and fire crew members. Crew leaders obtain work and establish the rates of pay for their crew members on an individual basis, earn income from the labour of crew members, and from the control they exercise over their crew members they obtain the chance to make a profit but also run the risk of incurring a loss. They also consider and treat themselves as employers for income tax purposes. In the result, I was satisfied that crew leaders are employers for purposes of the *Labour Relations Act*.
- I note that my conclusion in that respect did not depend in any way on the number of crew members engaged by the crew leaders. I was satisfied on the evidence before the Board that all crew leaders are employers, whether they have any crew members or not. A person, or corporation, can be an employer for purposes of the *Labour Relations Act* even if it has no employees. Nor does the Board's decision in *E. M. Carpentry (1982) Limited, supra*, suggest otherwise. As I have already indicated, that case dealt with an industry which is structured in much the same way as the low-rise residential roofing industry herein. However, in that case, all parties agreed that pieceworkers (the equivalent of crew leaders in this case) who had less than two helpers (crew members herein) were employees, and one of the parties specifically reserved the right to argue in subsequent proceedings that pieceworkers with only one helper are not "employees". Consequently, it was only the status of pieceworkers with two or more helpers which was in issue in *E. M. Carpentry (1982) Limited, supra*, and the Board concluded that those pieceworkers are employers.
- I was confirmed in my conclusion in this case by the relationship between crew leaders and roofing contractors. The relationship is one of contractor and subcontractor, both in Mr. Biso's evidence and on the agreement the CUSAW has managed to persuade a number of the roofing contractors to sign. Like the August 24, 1988 agreement before it, the current agreement is clearly intended to govern relations between crew leaders and and the roofing contractors, and is not for the benefit of crew members, notwithstanding the use of terms commonly found in collective agreements.
- I return now to the founding of the CUSAW. Notwithstanding the "five step" jurisprudence which establishes one way to form a "trade union" (Local 199 UAW Building Corporation, [1977] OLRB Rep. July 472; Canteen of Canada Limited, [1978] OLRB Rep. Sept. 802), there is no single procedure which must be followed to create a trade union. All that is required is that two or more "employees" agreed to be bound by an ascertainable constitution for purposes which include the regulation of relations between employees and employers (see, for example, Niagara Veteran Taxi, [1979] OLRB Rep. Sept. 889; Lavalle Tool & Mould Ltd., [1987] OLRB Rep. Oct. 1281; Ontario Hydro, [1989] OLRB Rep. Feb. 185). The minimum number of people required to form a trade union is two, regardless of the size of the potential bargaining unit(s) which the organization may pursue (Ontario Hospital Association (Blue Cross), [1981] OLRB Rep. June 763).
- 69. Further, the Board has rejected the notion that an organization cannot be a "trade union" merely because it has persons who are managerial within its membership; that is, "organization of employees" does not mean "organization of employees only" (*Hamilton Construction Association*, [1963] 2 O.R. 293 in which an application for Judicial Review of a Board decision on this issue was dismissed; *Ottawa General Hospital*, [1974] OLRB Rep. Oct. 714; *Chrysler Canada Ltd.*, [1975] OLRB Rep. Nov. 852; *Children's Aid Society of Metropolitan Toronto*, [1976] OLRB

Rep. Nov. 651; The Board of Education for the City of North York, [1984] OLRB Rep. Sept. 1279 ("York 1"); Ontario Hydro, supra).

70. But the issue in this case was not whether some members of the CUSAW are not "employees", and what effect that might have. The issue was whether it is an organization of employees. It clearly is not. The five individuals who formed the CUSAW, who are its officers, and who dominate the organization in every way, are employers. Although it may have accepted "employees" as members, it; like the CSA Inc. and the MTSA before it, is clearly an organization which has been formed by and is operated for the benefit of employers; that is, the crew leaders. It is not an "organization of employees". Accordingly, it cannot be a trade union. Since only a trade union can obtain bargaining rights or enter into collective agreements under the *Labour Relations Act*, the CUSAW holds no bargaining rights and has no collective agreements. Accordingly, the declarations made as aforesaid were appropriate.

1572-94-G International Brotherhood of Electrical Workers, Local 353, Applicant v. **Delta Catalytic Industrial Services Limited**, Responding Party v. General President's Maintenance Committee for Canada, Intervenor #1 v. Petro-Canada, Intervenor #2

Construction Industry - Construction Industry Grievance - Practice and Procedure - Employer objecting to Board's consideration of grievance under ICI provincial agreement because subject matter had earlier been referred to and decided by panel of General Presidents' Maintenance Committee under terms of General Presidents' Maintenance Committee Project Agreements - Employer's objection upheld - Board terminating proceeding before it

BEFORE: Jules Bloch, Vice-Chair, and Board Members F. B. Reaume and J. Redshaw.

APPEARANCES: L. A. Richmond and D. Hussey for the applicant; R. C. Filion and Tony Fanelli for the responding party; Chris G. Paliare, Nick Coleman and Steve Smillie for intervenor #1.

DECISION OF THE BOARD; April 22, 1996

- 1. This is a referral to the Board of a grievance filed by the International Brotherhood of Electrical Workers, Local 353 ("Local 353") against Delta Catalytic Industrial Services Limited ("Delta Catalytic") pursuant to what is now section 133 of the *Labour Relations Act*, 1995 ("the Act"). Local 353 filed this grievance under the terms and conditions of the collective agreement between The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and The International Brotherhood of Electrical Workers and The IBEW Construction Council of Ontario representing affiliated Local Unions 105, 115, 120, 303, 353, 402, 530, 586, 773, 804, 894, 1687 and 1739 ("the Provincial Agreement").
- 2. Delta Catalytic performed the work pursuant to the "General Presidents' Maintenance Committee for Canada Project Agreements for Maintenance by Contract in Canada" (the "GPA"). Pursuant to the GPA there is a mechanism whereby a committee called the General Presidents' Maintenance Committee ("GPC") reviews work to decide whether the reviewed work is either maintenance work (to be done pursuant to the GPA) or construction work (to be per-

formed under the Provincial Agreement). Under Article 7.000 of the GPA Local 353 filed a grievance in respect of 29 pieces of work arguing that the work was construction work as defined by the GPA. A panel of the General Presidents' Maintenance Committee, in a document entitled the "General Presidents' Maintenance Committee Grievance Panel Decision" dated July 18, 1994 decided that 27 pieces of the work in question were "maintenance" and two pieces of the work in question were "construction".

- 3. Delta Catalytic performed the 27 pieces of work labelled maintenance under the GPA agreement and subsequently Local 353 filed a grievance pursuant to the ICI Provincial Agreement alleging that the performance of such work was in contravention of the Provincial Agreement.
- 4. During the course of the first day of hearing in this matter the parties requested that the panel adjudicate a preliminary issue. At paragraph 6 of the May 12, 1995 decision this panel of the Board directed the parties to address the following questions:
 - 6. ... "Is Local 353 bound by the decision of the GPC panel or otherwise precluded, on a legal equitable or otherwise basis from raising the complaint by filing this grievance pursuant to the ICI Provincial Agreement. Further should the Board exercise its discretion by not awarding damages even if there was a breach of the ICI Provincial Agreement. Further, has Local 353 abandoned its grievance under the GPC and subsequently attempted to reinitiate it under the the Electrician's ICI Provincial Agreement."
- 5. The parties referred during argument to the following provisions of the Act:
 - 133.-(1) Despite the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 48, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.
 - (2) A referral under subsection (1) may be made in writing in the prescribed form by a party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within 14 days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.
 - (3) Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and subsections 48 (10) and (12) to (20) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.
 - (4) The expense of proceedings under this section, in the amount fixed by the regulations, shall be jointly paid by the parties to the Board for payment into the Consolidated Revenue Fund.
 - 162.-(2) Subject to sections 153 and 161, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.
- 6. The parties also referred to the following provisions of the General Presidents' Maintenance Committee for Canada Project Agreements For Maintenance by Contract in Canada:

ARTICLE 1.000 - APPLICATION FOR PROJECT AGREEMENT

- 1.100 Any company desiring to enter into a Project Agreement for Maintenance by Contract, must appear before the General Presidents' Committee (hereinafter the "Committee") for purposes of review and orientation and present to the Committee written evidence of the owner's intent to engage that company in the performance of maintenance service for a minimum period of one full year, subject to the usual termination clauses in such contracts.
- 1.200 It is further understood that the Project Agreement shall not be applicable for "shutdown" or "turnaround" work except when such work is performed within the scope of full or year-round supplementary maintenance contracts. In order to implement this restriction, it is understood that on newly constructed plants or units a shutdown may occur at any time under the terms of the Project Agreement but existing plants employing this service must have been under contract for full or year-round supplementary Maintenance service for at least four months prior to commencement of the shutdown/turnaround or such work shall be performed under the terms of the local Construction Agreement.
- 1.300 Should the contract for full or year-round supplementary maintenance be terminated during the term of this Collective Agreement for any of the projects listed, this Collective Agreement shall be considered null and void as it applies to that project or projects.

• • •

ARTICLE 3.000 - RECOGNITION

• • •

- 3.200 The Company and the Unions:
 - 3.201 Agree that the jurisdiction recognized herein for each Union shall be the jurisdiction recognized by the AFL-CIO, provided, however, that if they or the Unions are unable to agree upon the Union which is to have jurisdiction over any group of employees, the Company will recognize one as having jurisdiction until such time as the Claimant Unions agree upon another and provided further that work considered within the jurisdiction of any Union which is not represented by the Unions listed herein may be assigned by the Company to the jurisdiction of the most appropriate Union.
 - 3.202 Recognize the Unions as herein duly constituted for the purpose of bargaining collectively and administering this Agreement for the members of their respective Unions. The responsibility for interpretation and administration of this Agreement rests in the Committee.
 - 3.203 Agree to bargain collectively with the Unions and to be governed by the terms of this Agreement and by all lawful settlements of disputes and grievances made pursuant thereto. On maintenance work, the Project Agreement shall govern terms and conditions and take precedence over local construction agreements or area practices.

. . .

ARTICLE 6.000 - DEFINITIONS

- 6.100 Maintenance shall be work performed for the repair, renovation, revamp and upkeep of property, machinery and equipment within the limits of the plant property.
 - 6.101 "Long-Term Maintenance" shall be the continuing work performed of a

- maintenance, repair, renovation character within the limits of the plant property exclusive of "Short-Term Maintenance" defined below.
- 6.102 The Company will designate the anticipated number of Long-Term Maintenance force job openings at the pre-job meeting and from time to time as job conditions warrant.
- 6.103 "Short-Term Maintenance" work means work that is terminated within 30 available days of work.
- 6.200 All work performed by the Company on existing equipment and machinery, including all associated work in a given plant, shall be maintenance. This shall include replacement of existing individual items of machinery and equipment with new units, including all associated work. It is understood that this concept would not include replacement of an entire process system installation in a plant in order to increase production.
- 6.300 Addition of spare machinery or equipment may be done under the Maintenance Agreement provided it is for debottlenecking purposes. Example: There are two existing pumps. Both pumps are required to run at all times to maintain full production. A spare may be added for the purpose of having one pump down for maintenance.
- 6.400 Changes to existing units for reasons of feed stock changes or fuel changes shall be maintenance.
- 6.500 The work "repair" used within the terms of this Agreement and in connection with maintenance, is work requested to restore by replacement or by revamp of parts of existing facilities to efficient operating conditions.
- 6.600 The word "renovation" used within the terms of this Agreement and in connection with maintenance, is work required to change by replacement or by "revamp" of parts of existing facilities to efficient operating conditions.
- 6.700 Fire restoration work will be administered as follows:
 - 6.701 The restoration of a plant completely destroyed by fire is considered construction work.
 - 6.702 The restoration of a major part of a plant including several sections which have been destroyed or damaged by fire, shall be governed by the following criteria:
 - (a) The removal of damaged equipment and the preparation of the damaged area to make it suitable for new equipment will be Maintenance.
 - (b) The installation and erection of new equipment will be Construction.
 - 6.703 When the fire damage is localized to a given operating unit, such as a heater, distillation tower, compressor, pumphouse equipment and the like, then the restoration of same is to be considered Maintenance.
- 6.800 The administration and interpretation of this Article is the responsibility and prerogative of the General Presidents' Committee for Contract Maintenance in Canada.

ARTICLE 7.000 - GRIEVANCE PROCEDURE

7.100 It is agreed that it is the spirit and intent of this Agreement to adjust grievances promptly. All grievances, including discharge for just cause, but not those pertaining

to jurisdictional disputes that may arise on any work covered by this Agreement, must be initiated within fifteen (15) working days of the incident by either the employee in Step I or the Local Union in Step II and shall be handled in the following manner:

- 7.101 Step I: Between the aggrieved employee and/or his Steward and the Company supervisor.
- 7.102 Step II: Between the aggrieved employee, his Steward and/or Local Union Business Representative and his Foreman, the Supervisor and the Project Manager. If settlement is not achieved at this step, the grievance must be presented in writing to the Company and to the International Representative of the Union involved.
- 7.103 Step III: Between the International Union Representative and the Labour Relations Manager or the highest official of the Company.
- 7.104 Step IV: By negotiation between a committee of the unions signatory to this Agreement and senior officials of the Company at a meeting to be held at the place of work or a mutually agreeable location.
- 7.105 Step V: If any dispute or grievance concerning the interpretation, application or violation of this Agreement cannot be settled through the procedure described above within ten (10) working days, the matter may be submitted by a Signatory Union to this Agreement or the Company, to a Board of Arbitration for adjudication. This Board shall consist of three (3) Arbitrators, one appointed by each party to this Agreement and the third, who shall act as Chairperson, to be selected by the two so appointed. The party desiring arbitration shall appoint its Arbitrator and shall give notice in writing to the other party together with a written statement of the question to be arbitrated. In the event that the other party does not appoint its Arbitrator within three (3) days the appointment shall be made by the Minister of Labour for the Province in which the grievance occurs.

In the event the two Arbitrators appointed cannot within three (3) days select a third Arbitrator who is willing to serve, the two Arbitrators shall jointly request the Minister of Labour of the Province in which the grievance occurs to designate the third Arbitrator who shall act as Chairperson. This Board when selected or appointed will proceed as soon as practicable to examine into the dispute or grievance and on the basis of the facts, render its judgement. The majority or unanimous decision of the Board of Arbitration shall be final and binding and accepted by both parties for the duration of the Agreement.

In the event that a majority decision is not reached by the Board of Arbitration, the decision of the Chairperson shall be deemed to be the decision of the Board and shall be final and binding and accepted by both parties for the duration of the Agreement.

The Arbitration Board shall not be authorized to make any decisions inconsistent with the provisions of this Agreement, nor to alter, modify or amend any part of this Agreement.

In arbitration proceedings, each party shall pay the expenses of its Arbitrator and the expenses of the Chairperson shall be shared equally by the parties.

The Company shall provide the necessary facilities for the grievance meetings.

- 7. The Board does not regard it as necessary to recount the evidence in detail nor to set out separately the complete submissions of the parties. The Board has carefully considered the testimony of the witness, the parties' representations, and the relevant jurisprudence in reaching its decision.
- 8. The only witness in this proceeding was Steven Smillie. Mr Smillie is the Executive Director of the GPC.
- 9. Delta Catalytic is a company that provides supplemental plant maintenance services to industrial operations. Delta Catalytic is bound to the Provincial Agreement. A company must first be bound to the Provincial Agreement before it can be bound to the General Presidents' Agreement. In other words, prior to receiving the benefit of the General Presidents' Agreement, which is a project maintenance agreement, the company must be signatory to the Provincial Agreement, which is an ICI agreement.
- 10. The signatories to this particular General Presidents' Agreement are Delta Catalytic and twelve international building trades unions, including the International Brotherhood of Electrical Workers ("IBEW"). Delta Catalytic has been performing work at Petro-Canada pursuant to the terms and conditions of successive General Presidents' Agreements since 1983.
- On November 4, 1993 the IBEW, on Local 353 letterhead, filed a grievance pursuant to the General Presidents' Agreement. This grievance was filed in respect of certain work assigned as maintenance work under the GPA by Delta Catalytic at Petro-Canada's Mississauga refinery. Local 353 asserted that the work in question was construction work and should be performed under the Provincial Agreement.
- Pursuant to Article 7.104 of the GPA, the grievance was referred to a panel of the GPC for resolution. (A full discussion of the role of the GPC is found below.) This grievance, like all other grievances involving the characterization of work as either "maintenance" or "construction", was resolved through the dispute resolution process. At the end of the process, and through the intervention of a panel of the GPC, it was determined that 27 of the 29 work items were "maintenance" work and properly performed under the General Presidents' Agreement. This matter was resolved through the process on or about July 18, 1994.
- 13. On or about August 2, 1994 IBEW Local 353 filed a grievance under the Provincial Agreement. This grievance involves the same issues and the same work that was resolved through the GPC process pursuant to the GPA.
- Article 6.800 of the GPA assigns the responsibility for the administration and interpretation of Article 6.000 to the GPC. For our purposes Article 6.000 is the portion of the GPA that deals with the dichotomy between maintenance and construction (i.e. whether the work in question will be performed pursuant to the GPA or the Provincial Agreement).
- Mr. Smillie testified that the GPC's purpose was to negotiate and administer a multicraft maintenance agreement. This type of agreement allowed the trades to compete for supplemental plant maintenance work. According to Mr. Smillie, during the currency of the GPA, it is the responsibility of the GPC to administer and interpret Article 6.000. This particular grievance was processed by Mr. Smillie in his capacity as Executive Director of the GPC. Upon receipt of the grievance, Mr. Smillie initiated a Step II grievance meeting between Local 353 and the company. In this case the grievance was not resolved at Step II. Subsequently, Mr. Smillie, in accordance with the GPA, arranged a Step III grievance meeting between Mr. Bill Warchow, (an IBEW international representative) and Mr. Tony Fanelle, Delta Catalytic's Labour Relations Officer. Reprenational representative

sentatives from Local 353 were in attendance at this meeting. As well Local 353 had prepared Mr. Warchow for the meeting by outlining the problem in a letter to him dated April 12, 1994. This matter was not resolved at Step III. Subsequent to the failure to arrive at a settlement at Step III, the grievance procedure proceeded to Step IV.

- Mr. Smillie testified that Step IV of the grievance procedure, as it relates to the obligations on the GPC contained in Article 6.800, involves the setting up of a committee of International Representatives from unions not involved in the dispute. In this case Mr. Smillie assigned Mr. Gerry Bentley from the U.A. (who served as Chair of the panel), George Henry, from the Boilermakers, and Don Oshanek, from the Ironworkers, who served on the panel as members. Mr. Smillie was present throughout the Step IV process and served as note taker.
- 17. Step IV of the process, according to Mr. Smillie, involves a review of all the work in dispute by the panel. All parties are able to make submissions to the panel on each piece of work. After hearing the submissions of the parties the panel then makes a written decision which is binding on all of the parties involved in the dispute. This process satisfies the Step IV requirements and brings an end to the dispute.
- 18. Mr. Smillie testified that in Ontario, the GPC must comply with the terms of the Act. If the work performed by Delta Catalytic at Petro-Canada was "construction" work then the Provincial Agreement would apply to that work. Mr. Smillie testified that the GPC was aware of the Board jurisprudence in respect of the dichotomy between "construction" and "maintenance".
- 19. Mr. Smillie testified that all the international unions signatory to the GPA (and their locals) understand the process under Step IV of the GPA. According to Mr. Smillie, the process involves an acceptance by all the parties involved, including the local union that initiated the grievance at Step II, that the decision of the panel resolves the dispute. In effect, after a decision of the panel no party can bring the disputed issues to arbitration. Mr. Smillie testified that this was the first time that any union had challenged the process. As well, he testified that Local 353 had been part of the GPA for many years. They supplied members from the hiring hall and were paid according to a Local 353 wage and benefit schedule under the GPA. Further, Local 353 had participated in the grievance process in the past and had not previously challenged the process.
- Mr. Smillie testified that, in respect of the instant grievance, a meeting was held on July 13, 1995 with the GPA panel at the Petro-Canada Mississauga refinery site. Present for the IBEW were Mr. Warchow, Dave Hussey, Business Agent for Local 353, Steve Milne, Business Agent for Local 353 and Alan Minsky, legal counsel. Present for Delta Catalytic were Tony Fanelli, Labour Relations Officer, Gord Duggan, Project Manager and Bruno Barazza, Site Manager. Everyone was entitled to make full submissions on the work in question. Everyone went on a plant tour. After the tour the meeting reconvened so that anyone who wanted could ask questions or make further submissions. The panel decision resolving all matters in dispute was issued on July 18, 1994.
- 21. The parties relied on the case law cited below:

Rasanen v. Rosemount Instruments Limited (1994), 17 O.R. (3d) 267 (Ont. C.A.)

Canadian General Electric Company Limited, [1978] OLRB Rep. Apr. 384

Oakwood Park Lodge, [1980] OLRB Rep. Oct. 1501

McIntosh Limousine Service Ltd., (Board File No. 0755-94-U, decision dated August 8, 1994, as yet unreported)

Valdi Inc., [1980] OLRB Rep. Aug. 1254

Windsor Western Hospital Centre Inc. (Riverview Unit) (1986), 16 O.A.C. 1 (Ont. Div. Ct)

City of Sudbury (1965), 15 L.A.C. 405

E.S. Fox, [1992] OLRB Rep. Jan. 29

Comstock International Ltd., [1982] OLRB Rep. June 852

Losereit Sales & Services Ltd., [1983] OLRB Rep. Apr. 569

Losereit Sales & Services Ltd., [1983] OLRB Rep. July 1090

Union Gas (1967), 18 L.A.C. 285

Lummus Co. Canada, [1976] OLRB Rep. Jan. 980

EPSCA, [1987] OLRB Rep. Aug. 1079

National Elevator & Escalator Association, [1991] OLRB Rep. Apr. 555

Consamar Inc., [1991] OLRB Rep. May 601

Sikora Mechanical Ltd., [1982] OLRB Rep. June 941

All-Pro Contractors, [1982] OLRB Rep. Aug. 1109

Honeywell Controls Ltd., [1983] OLRB Rep. May 641

Quinard Limited, [1982] OLRB Rep. July 1054

Fahrhall Mechanical Limited, [1982] OLRB Rep. Aug. 1174

C. E. Lummus Canada Ltd., [1983] OLRB Rep. Oct. 1688

The Board of Education for the City of Windsor, [1988] OLRB Rep. Mar. 342

Culliton Brothers Limited, [1982] OLRB Rep. Mar. 357

Abitibi-Price Inc., [1984] OLRB Rep. Sept. 1155

Municipality of Metro Toronto, [1992] OLRB Rep. July 817

Copper Cliff Mechanical Contractors Ltd., [1987] OLRB Rep. Nov. 1357

Inscan Contractors (Ontario) Inc., [1986] OLRB Rep. May 640

Williams Contracting Ltd., [1980] OLRB Rep. July 1115

Ontario Hydro, [1986] OLRB Rep. Aug. 1137

Belyea Construction Ltd. Cushing v. Snaddon et al, (1983) 3 D.L.R. (4th) 221

MacKenzie v. Moore's Taxi Co. Ltd., [1938] 2 D.L.R. 195

Walls v. Hanson (1964), 49 D.L.R. (2d) 435

Ontario Human Rights Commission et al. v. Borough of Etobicoke (1983), 132 D.L.R. (3d) 14

Ontario Hydro and Ontario Hydro Employees' Union, Local 1000 et al, (1983), 41 O.R. (2d) 669

Longyear Canada Inc. and International Association of Machinists, Local Lodge 2412, (1981), 2 L.A.C. (3d) 72

- Delta Catalytic submitted that Local 353 initiated a grievance process, pursuant to the 22. GPA, which culminated in an alternative dispute resolution mechanism and a final and binding resolution to the issues in dispute. The process for deciding which work will be done pursuant to the GPA (maintenance work) and which work will be done pursuant to the Provincial Agreement (construction work or ICI work) involves a unique method of dispute resolution. This process, asserted Delta Catalytic, in light of Article 6.800 and Article 7.104 of the GPA, involved a binding mechanism for resolution of issues like this one. A panel of international union representatives is struck to review all the work in dispute, hear all submissions from all the parties, and then issue a binding resolution to the matter. Local 353 never challenged the process during the grievance procedure. In fact, contended Delta Catalytic, it initiated the process and retained legal counsel. Local 353, asserted Delta Catalytic, had previously been involved in this process and had accepted the process in total. Local 353, in Delta Catalytic's view, knew of the binding nature of the process, waited until it received the decision of the panel, was unhappy with the panel's resolution and then filed for arbitration at the Board pursuant to section 126 (now section 133), hoping for a better result. Delta Catalytic relied on the principles of issue estoppel (See: Rasanen v. Rosemount, supra; McIntosh Limousine, supra).
- 23. GPC, which intervened, adopted all the submissions of Delta Catalytic. Further, it asserted that this case was similar to the decision in *E.S Fox Limited*, *supra*. Local 353 initiated the dispute resolution mechanism under the GPA, received a final resolution to the dispute, and consequently cannot be allowed to begin a new process under the Provincial Agreement because all matters in dispute have been resolved. In respect of the issue estoppel argument, GPC also relied on *Comstock*, *supra*; and *Losereit Sales and Services Ltd.*, *supra*.
- Local 353 asserted that the GPC process under the GPA could not bar its right to arbitration. Local 353 asserted that it was not a party to the GPA. In its view it had no right on authority to launch grievances under the GPA. It was, contended Local 353, the international unions that set up this mechanism to block arbitrations, and consequently Local 353 should not be considered to be bound by a decision of a panel of the GPC.
- 25. In Local 353's view, the decision of the panel of the GPC was in violation of section 162(2) of the Act. This panel of the GPC, contended Local 353, had found some of the twenty-nine items of work in dispute to be maintenance work when they were clearly construction work. By permitting the performance of construction work pursuant to the GPA, asserted Local 353, the

GPC was administering a collective agreement which acts as a second Provincial Agreement in the ICI sector and consequently runs afoul of 162(2) of the Act. In Local 353's view, no one may properly contract out of the Act. By allowing Delta Catalytic to perform ICI work pursuant to the GPA, the Board, in Local 353's view, would be allowing Delta Catalytic to receive the benefit of a second provincial ICI agreement. (See: *Inscan Contractors, supra; Sikora Mechanical, supra*; and *All-Pro Contractors, supra.*)

- 26. Further, asserted Local 353, the Board cannot apply an equitable doctrine such as estoppel against a public statute. The administration of Article 6.800, insofar as the process adopted determines ICI work to be "maintenance" work and therefore capable of performance under the GPA, cannot find the underpinnings of the doctrine of estoppel.
- 27. Local 353 asserted that the determination pursuant to Step IV of the grievance process was suspect because of a lack of independence of the panel. Local 353 asserted that it was in the panel's interest to place as much work as possible into the GPA. In Local 353's view, the panel did not take into account section 162(2) of the Act when making its decision and consequently its decision cannot form the basis of an estoppel since the issue subject to the estoppel had not been properly adjudicated upon.

Decision

- 28. Local 353, in accordance with Step II of Article 7.000 of the GPA, initiated the grievance procedure. In a letter dated April, 12 1994 from Local 353 to Mr. Warchow, the Local set the stage for Step III of the grievance procedure. A Step III meeting was held, and the matter was not settled. Both the Local and the International requested a Step IV meeting. Step IV involves the process described in paragraph 11 and paragraphs 15 through 17 above.
- We find that, on July 13, 1994, a Step IV meeting was held with the panel at the Petro-Canada Mississauga refinery site. All present were given a full opportunity to make submissions respecting the nature of the work in question. Everyone went on the plant tour. After the tour the meeting reconvened and anyone who wanted to could ask questions or make further submissions. The panel decision resolving all matters in dispute was issued on July 18, 1994.
- We find that Local 353 initiated the grievance process and was aware or ought to have been aware of the dispute resolution mechanism at Step II involving the GPC, found in the GPA. At no time during the submissions before the GPC panel did Local 353 raise any concerns about the make-up of the panel, the ability of the panel, or the panel's understanding of section 162(2) of the Act. Further we find that the GPC was fully aware of section 162(2) of the Act and the Board's jurisprudence pursuant to that sub-section when it rendered its decision resolving all matters in dispute.
- 31. In our view this is not a case which involves the performance of ICI work pursuant to the GPA thus allowing Delta Catalytic to receive the benefit of a "second" provincial ICI agreement contrary to section 162(2) of the Act. We are of this view because a determination was made by the panel of the GPC and their mandate was specifically to decide which work was in fact ICI work to be performed under the Provincial Agreement and which work was in fact "maintenance" work to be performed under the GPA. The GPA panel's resolution of the issues before it was based upon the statutory imperative found in section 162(2) of the Act.
- 32. The Board's decision in E.S. Fox Limited, supra, involves the settlement of a grievance at step three. E.S. Fox Limited was bound to the then current collective agreement between the Association of Millwrighting Contractors of Ontario Inc. and the Millwright District Council of

Ontario covering the ICI sector of the construction industry. The grievance process included at step three a dispute resolution system similar to the one in this case. A committee formed of members of the trade union and a committee formed of members of the employer association met and issued a decision. The members of the association committee were, in fact, competitors of E.S. Fox Limited. The decision of the Committees resolved the grievance. The Board held that the grievance had been settled at step three and that the settlement was binding on E.S. Fox Limited. The Board at paragraph 21 said the following about the parties intent with respect to an alternative dispute resolution system:

21. In the *Beckett Elevator Company* case, [1983] OLRB Rep. March 309 (the reconsideration of the case we have referred to as the *Beckett* case) the Board after noting the statutory limitation set out in section 145(a) went on to say:

• • •

For the purposes of this case we need not speculate on the factual or contractual circumstances which might prompt the Board to give binding effect to a body such as the J.I.C. [Joint Industry Committee], nor should our decision be interpreted as a signal that the Board is anxious to deal with problems which traditionally have been, and probably should be, resolved in another less formal forum. But we do not think that this J.I.C., under this agreement, in these circumstances, has given an interpretation of the parties' collective agreement which the Board must merely enforce. ...

. . .

The contractual circumstances in this case are quite different from those in Beckett. Beckett did not deal with "contractual circumstances which might prompt the Board to give binding effect to a body such as the JIC ...". The issue before us is whether those contractual circumstances are present here. There is no doubt given the statutory framework (see for example section 139(d) and (e), section 145, 149 [formerly section 147]) that the employer and employee bargaining agencies can negotiate into their collective agreement provisions for a JIC as they did in this case. In the circumstances of the case before us and for the reasons outlined in paragraph 15, we feel it is important to give effect to the collective agreement language. Fox participated in the Committee meeting and now seeks to resile from the settlement reached at the meeting. Signatories to the collective agreement, in this case the Association and the Council, have freely negotiated the current language in the collective agreement. This type of clause, providing for a joint committee, is common in the construction industry and the Board should be reluctant to interfere with a process which has been agreed to by the parties. Stability in labour relations is very important and the Board should tread lightly in making decisions which could upset an ongoing relationship. In our view, it is appropriate to enforce the decision of the Committee settling this matter at Step Three of the grievance procedure.

- 33. In our view this fact situation is similar to the fact situation presented before the Board in E.S Fox Limited, supra. One distinction is that Local 353 had an alternative to the dispute resolution mechanism found in the GPA, while E.S. Fox Limited did not have an alternative to the Provincial Agreement. In Inscan Contractors (Ontario) Inc., supra, the International Association of Heat and Frost Insulators & Asbestos Workers and the International Association of Heat and Frost Insulators & Asbestos Workers, Local 95, initiated a grievance pursuant to their ICI agreement because Inscan Contractors (Ontario) Inc. allegedly performed ICI work pursuant to a General Presidents' Project Agreement. The Board in that case found for the trade union. The trade union in that case decided to grieve pursuant to its ICI agreement and chose the Board as its forum to decide what work ought properly be done pursuant to the ICI agreement and what work, if any, ought properly be performed pursuant to the General Presidents' Agreement.
- 34. In the case before us, Local 353, by initiating the grievance pursuant to step two of the GPA, set in motion a set of events that led to the matter being resolved by the GPC. In our view it

would be patently unfair for the Board to allow Local 353 to re-litigate this issue. Once Local 353 set off on the course of its own choosing it became the author of its own destiny.

35. The Board upholds the preliminary motion of the responding party and concludes that the dispute before us has been resolved by the panel of the GPC. In that regard there is no outstanding grievance before us. This proceeding is terminated.

4225-95-T International Brotherhood of Electrical Workers, Applicant v. International Brotherhood of Electrical Workers, Local 1788, Responding Party

Interim Relief - Remedies - Trusteeship - International union seeking to extend trusteeship over local beyond 12 month period - Application to extend trusteeship filed 12 days before statutory expiry of trusteeship - International union asking to extend trusteeship on interim basis pending disposition of main request - Request for interim extension of trusteeship dismissed - International directed to forward notices and copies of Board's decision to all members of local

BEFORE: Lee Shouldice, Vice-Chair.

DECISION OF THE BOARD; April 2, 1996

1. This is a request brought by the International Brotherhood of Electrical Workers (hereinafter "the International") to extend its trusteeship over the International Brotherhood of Electrical Workers, Local 1788 (hereinafter "Local 1788") for a further period of 12 months. The request is made pursuant to section 89(2) of the *Labour Relations Act*, 1995 (hereinafter "the Act") which reads as follows:

89.(2) Where a provincial, national or international trade union has assumed supervision or control over a subordinate trade union, such supervision or control shall not continue for more than 12 months from the date of such assumption, but such supervision or control may be continued for a further period of 12 months with the consent of the Board.

The initial trusteeship was imposed on Local 1788 on April 7, 1995. In order to extend the trusteeship beyond April 7, 1996, the International requires the consent of the Board, as is evident from the above-noted statutory provision.

- 2. The International has requested that "interim arrangements" be ordered by the Board in this proceeding. The application was filed with the Board on March 26, 1996. The International notes that the request was made at a time when it was unlikely that the Board would be able to render a decision on the merits of the request. Accordingly, the International requested that the Board extend the trusteeship on an interim basis until the request is disposed of. In support of the interim request, counsel cites *United Brotherhood of Carpenters and Joiners of America*, [1972] OLRB Rep. Sept. 833.
- 3. The request brought by the International was filed with the Board during the course of a strike which has affected the day-to-day operations of the Board. Acknowledging that reality, counsel for the International forwarded a copy of the request to extend the trusteeship directly to counsel who acts for the Power Workers' Union C.U.P.E. Local 1000 (a party which is involved in various litigation with Local 1788 and the International) and a number of individuals who have

brought a number of unfair labour practice applications before the Board relating to this trusteeship. In all of the circumstances, the Board felt it appropriate to convene a hearing by way of telephone conference call in order to entertain the submissions of those who most likely would oppose an interim extension of the trusteeship, pending the determination of the request on its merits. Accordingly, the Board heard the submissions of counsel on this issue by way of telephone conference call on Friday, March 29, 1996.

- 4. There is no doubt that for many years there have been significant disputes between the International and Local 1788 regarding numerous matters, which culminated in the trusteeship imposed by the International on Local 1788 on April 7, 1995 (encompassed within Minutes of Settlement dated April 7, 1995 in Board Files 4396-94-U and 4397-94-M). It is unnecessary to detail any of these matters of dispute. Suffice it to say that it could hardly be said to be surprising to anyone familiar with the situation, in particular the International, that there would continue to be members of Local 1788 who disagree with the position of the International, and the trusteeship imposed on Local 1788. The level of the dissent is evident by reference to the massive amount of litigation pending before the Board and the courts involving these two entities.
- 5. It is in this context that I consider the request by the International for "interim arrangements" in this proceeding. I am troubled by the request for many reasons. Most importantly, in light of the sheer length of time that it takes to litigate matters of this complexity and degree of dispute (and both counsel have, quite reasonably, requested that other Board proceedings be listed and heard together by the Board with this one), the "interim" relief requested by the International may well effectively become the final relief to which it *could* be entitled if the International were successful on the merits of its request. It is unfortunate that litigation of this nature cannot be disposed of in a shorter period of time, but given the number of parties, the various proceedings to be heard, and the limited resources available to the Board, this is a reality which cannot be ignored. It is evident that delay in the determination of the request for extension is inherently prejudicial to those who oppose it, if an interim order extending the current trusteeship is made.
- I am also troubled by the fact that the International waited until 12 calendar days prior 6. to the statutory expiry of the trusteeship to bring this request to extend it. Counsel for the International did not persuade me during the telephone conference call that there are any legitimate reasons for the delay in bringing this request. It has been evident for months that the litigation involving Local 1788 and the Power Workers' Union would not be completed before the expiry of the trusteeship, and the public sector work dispute does not hold up as a legitimate reason for the failure to request an extension in a more diligent manner. If this proceeding had been commenced in February, 1996, notice to the members of Local 1788 could have been sent, and the litigation readied, much earlier. As it now stands, the notice process is just commencing, and it will take at least a few weeks to complete. Given the context within which the request for extension is made - the existence of significant Board and court litigation and, more importantly, the existence of what appears to be significant opposition to the International amongst the membership of Local 1788 one could argue, as counsel for certain members of Local 1788 did, that the International desired the extension of the trusteeship on an "interim basis" in order to consolidate its position, to the best of its ability.
- 7. I have carefully considered the able submissions of counsel respecting the request for interim relief. Assuming that the Board has the statutory power to make the interim order requested by the International (and during argument neither counsel took issue with that proposition), as there have been no assurances made by the International that elections would be completed by June, 1996 as is required by the I.B.E.W. Constitution and Local 1788 By-Laws, and as there is no reason to extend the trusteeship in order to facilitate the administration of such elec-

tions, the Board is not inclined to extend the trusteeship on an interim basis pending the disposition of this application, and therefore declines to do so.

- 8. The International is directed to forward the notice attached to this decision and copies of the request filed by the International in Board File 4225-95-T, and the applications in Board Files 4077-95-U and 4100-95-U, to each member of Local 1788. These materials are to be forwarded to the members of Local 1788 forthwith.
- 9. I have reviewed Board Files 4077-95-U and 4100-95-U. It is apparent that those proceedings should be listed together with this proceeding for hearing, and I so direct. I am of the view that Board File 4396-95-U ought not to be reactivated as has been requested by Mr. Richmond in his letter dated March 25, 1996. Mr. Richmond, who is counsel for the Power Workers' Union and the individual complainants in Board Files 4077-95-U and 4100-95-U, requested that that Board File be brought back on for hearing before the Board in conjunction with the other above-noted proceedings. He purported to do so on behalf of "the Applicant" in that proceeding, Local 1788. It is, however, evident from the Minutes of Settlement filed with the Board in that proceeding that the parties desired that that application be adjourned sine die. By way of decision of the Board dated April 26, 1995, a differently constituted panel of the Board adjourned the proceeding sine die, noting that unless any party to that proceeding requested that the matter be brought on within one year of that date, the proceeding would be terminated. The parties to that proceeding are the International and Local 1788. Counsel requesting that the matter be brought on for hearing no longer represents Local 1788. As neither Local 1788 nor the International has requested that the proceeding be relisted, the Board will not do so.
- 10. This proceeding is referred to the Registrar to be listed, together with Board Files 4077-95-U and 4100-95-U, for hearing.

April 2, 1996

NOTICE TO ALL MEMBERS OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 1788

The International Brotherhood of Electrical Workers has made an application to the Ontario Labour Relations Board to extend the trusteeship over Local 1788 for a further period of twelve months. A copy of this application is attached.

The International Brotherhood of Electrical Workers imposed a trusteeship on Local 1788 on April 7, 1995. Section 89(2) of the *Labour Relations Act* provides that where an international trade union has assumed supervision or control over a subordinate trade union, such supervision or control shall not continue for more than twelve months from the date of such assumption but such supervision or control may be continued for a further period of twelve months with the consent of the Board.

The following members of Local 1788, Henry Tomsett, Robert Thoms, Ron Young, Gregory O'Donnell, Hugh Gillies, Gregory Chaffey, John Caskanette, Leonard Crausen, and Richard Hansen, have applied under Section 96 of the *Labour Relations Act* seeking to have the trusteeship ended. The same individuals and the Power Workers' Union have also applied under section 96 of the Act for certain relief against the International Brotherhood of Electrical Workers and Ontario Hydro. A copy of those applications are attached. If you wish a copy of any of the attachments referred to in the applications, please contact the Ontario Labour Relations Board at the address listed below.

If you wish to participate in any of these applications, you or your agents must advise the Ontario Labour Relations Board in writing within fifteen (15) working days of the date of this notice, setting out OLRB File Nos. 4077-95-U, 4100-95-U and 4225-95-T, and a summary of the position you wish to take. Send your documents to:

Ontario Labour Relations Board 400 University Avenue 4th Floor Toronto, Ontario M7A 1V4 (416) 326-7500

Attention: Ms. T. A. Inniss, Registrar

AND TO:

Caley & Wray

Barristers and Solicitors 111 Richmond St. West

Suite 1205

Toronto, Ontario

M5H 2G4

Attention: Mr. D. A. McKee

Counsel for International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers,

Local 1788.

AND TO:

Sack Goldblatt Mitchell Barristers and Solicitors

20 Dundas Street West, Box 180, Suite 1130

Toronto, Ontario

M5G 2G8

Attention: Mr. L. A. Richmond Counsel for Henry Tomsett et al.

AND TO:

Hicks Morley Hamilton Stewart Storie

Thirtieth Floor

Toronto Dominion Bank Tower

Box 371, T D Centre Toronto, Ontario

M5K 1K8

Attention: Mr. Patrick Moran

Counsel for Ontario Hydro and Electrical Power Systems Construction Association.

1132-95-G International Brotherhood of Electrical Workers, Local 105, Applicant v. Jaddco Anderson Limited, Responding Party

Construction Industry - Construction Industry Grievance - Parties - Practice and Procedure - Union's grievance raising issue of whether work involved construction work or maintenance work - Union alleging that work covered by ICI agreement and employer asserting that work properly dealt with under terms of General Presidents' Maintenance Committee for Canada Project Agreement - General Presidents' Maintenance Committee for Canada ("GPC") and project owner each seeking to intervene in proceeding - Board concluding that neither project owner nor GPC entitled to standing as of right, but granting standing to GPC as matter of discretion - Project owner denied standing

BEFORE: M. A. Nairn, Vice-Chair, and Board Members Orval R. McGuire and G. McMenemy.

APPEARANCES: Raj Anand, Brian Illion and John Grimshaw for the applicant; Roy Filion, Daryn Jeffries and Brian Timmins for the responding party; Chris G. Paliare and Steve Smillie for General Presidents' Maintenance Committee for Canada; F. G. Hamilton and Don Gerrard for Dofasco Inc.

DECISION OF THE BOARD; April 18, 1996

- 1. This is an application under what is now section 133 of the *Labour Relations Act*, 1995 (the "Act"). The applicant ("Local 105" or "the trade union") has referred a grievance to the Board for final and binding determination.
- 2. The grievance asserts that the responding party ("Jaddco" or "the employer") has failed to pay the proper wage rates and other benefits to employees and to the trade union in accordance with the Principal Agreement between the Electrical Trade Bargaining Agency of the Electrical Contractors' Association of Ontario and the International Brotherhood of Electrical Workers and the I.B.E.W. Construction Council of Ontario (the "Principal Agreement" or the "ICI agreement"). This assertion arises in connection with work being performed from and after March 13, 1995 on the #3 blast furnace at a project for Dofasco Inc. in Hamilton. The responding party asserts that the work in question was properly dealt with pursuant to the terms of the General Presidents' Maintenance Committee for Canada Project Agreement ("the project agreement"). This grievance inherently raises the issue of whether the work in issue is construction work or maintenance work.
- 3. A hearing was convened to deal with two preliminary matters; an issue of standing, and an issue of production. The applicant and responding party, after some discussion with the panel, agreed to adjourn the issue of production and attempt to resolve that matter between themselves. The applicant acknowledged that an implied undertaking existed in respect of any documents produced; that they were for use only in this proceeding. That matter was adjourned. The applicant has since advised the Board that the matter remains unresolved. In light of the conclusion reached in this decision on the issue of standing, notice is to be provided to the G.P.C. of the hearing of that matter.
- 4. The General Presidents' Maintenance Committee for Canada (the "G.P.C.") and Dofasco Inc. ("Dofasco") both sought to intervene in the proceeding. The granting of standing to either entity was opposed by the applicant and supported by the responding party. We received documentary evidence and certain background information not in dispute, and heard submissions on the issue.

- 5. Both the G.P.C. and Dofasco rely on the project agreement to assert interests that they argue warrant the granting of standing. That project agreement is representative of the type of agreement that the G.P.C. has historically negotiated in respect of maintenance work. A review of the document identifies Sheafer-Townsend Maintenance Ltd. ("Sheafer") as the employer party to the project agreement, entered into with thirteen international trade unions covering maintenance, repair and renovation work for a project identified as Dofasco Inc., Hamilton. The parent international to Local 105, the International Brotherhood of Electrical Workers (the "I.B.E.W.") is one of those unions. There is no dispute that Local 105 is also bound to the project agreement.
- 6. A meeting was held on May 29, 1995 in respect of the work in issue in this grievance. Representatives from the G.P.C., Local 105, Local 67 of the Plumbers and Pipefitters union, Dofasco, and Jaddco attended. The nature of the work was discussed. Local 105 took the position that the work in issue was construction and should be performed under the ICI agreement. The G.P.C. was of the view that the work was maintenance work. Subsequently, this grievance was filed.
- 7. The work in issue is being performed by Jaddco. It appears to have been awarded directly by Dofasco. Notes of a meeting held May 29, 1995 indicate that Jaddco stated it had been awarded the work through a bid process conducted by Dofasco, and that Sheafer and other contractors had bid the work as well. Jaddco is signatory to a "Sub-Contractor Adherence Agreement" as of July 14, 1992, wherein it agrees to be bound by the terms of the project agreement between "The Committee" (referring to the G.P.C.) and Sheafer for the Dofasco project. The G.P.C. is placed in quotation marks here because it is a committee comprised of representatives of the international unions. The G.P.C. is not signatory to the project agreement, although through the adherence agreement, it purports to bind Jaddco to the project agreement.
- 8. In its pleadings, the G.P.C. relied on its constitution to assert that the international unions have "empowered the Committee to act as the exclusive and irrevocable agent of the Member International Unions and of each Member international Union" with respect to matters falling within the G.P.C.'s jurisdiction. That jurisdiction includes endeavoring to bargain and secure maintenance agreements with employers or associations thereof, that undertake maintenance work in Canada.
- 9. That constitution was not filed with the Board. Arguably, we do not have the constitution before us as fact. However, it is also acknowledged by the G.P.C. that, by the terms of that constitution, a member international union is only bound to a collective agreement negotiated by the G.P.C. in the event that the international union executes such collective agreement.
- The point of this discussion is to illustrate the lack of contractual interest held by the G.P.C. as opposed to its member international trade unions. The G.P.C. at its highest, acts as agent with respect to any contractual interest held by the signatories to the project agreement.
- 11. However, the project agreement does require the G.P.C. to exercise certain responsibilities. The system that has developed over a substantial history in the construction industry contemplates a contractor being able to provide a guarantee of a minimum amount of maintenance work in respect of a particular project before the G.P.C. will consider entering into a maintenance agreement with that contractor. Once an agreement is reached, the G.P.C. is charged with interpreting and administering the maintenance agreement. The recognition clause of the project agreement provides, in part:

ARTICLE 3.000 - RECOGNITION

- 3.100 The bargaining unit under this Agreement shall comprise all employees of the Company, coming under the jurisdiction of the Union signatory to this Agreement, now employed and employed in the future for maintenance, repair and renovation work at the Owner's plant site.
- 3.200 The Company and the Unions:

. . .

- 3.202 Recognize the Unions as herein duly constituted for the purpose of bargaining collectively and administering this Agreement for the members of their respective Unions. The responsibility for interpretation and administration of this Agreement rest in the Committee.
- 3.203 Agree to bargain collectively with the Unions and to be governed by the terms of this Agreement and by all lawful settlements of disputes and grievances made pursuant thereto. On maintenance work, the Project Agreement shall govern terms and conditions and take precedence over local construction agreements or area practices.
- 12. The scope of the work covered by the project agreement is set out at Article 5.000 of the agreement:

ARTICLE 5.000 - SCOPE OF WORK

- 5.100 The scope of this Agreement covers all work of a maintenance, repair and renovation nature, assigned by the Owner to the Company and performed by the employees of the Company covered by this Agreement, within the limits of the Owner's plant site.
- 5.200 The scope of this Agreement does not cover work performed by the Company of a new construction nature which is work required to erect new facilities in which event the work shall be done in accordance with existing building construction agreements.

. . .

- 13. Definitions of the words maintenance, repair, and renovation are set out in Article 6.000 of the project agreement and Article 6.700 provides that:
 - 6.700 The administration and interpretation of this Article is the responsibility and prerogative of the General Presidents' Committee for Contract Maintenance in Canada.
- 14. The G.P.C. relies on Articles 3.202 and 6.700 to assert that the project agreement expressly allocates responsibility for the resolution of the question of whether work is maintenance or construction, and consequently whether it is to be performed under the project agreement or the ICI agreement, to the G.P.C. Further it notes that the committee is made up exclusively of representatives of the constituent international unions, and that therefore the decision as to which agreement will apply is within the hands of the unions, and not within the control of the employer. The G.P.C. also relies on this feature of the project agreement to assert that the work is properly characterized as maintenance, because the unions themselves have so agreed.
- 15. Grievances from local unions, including Local 105, concerning the application of the project agreement to work being performed, have been referred to the G.P.C. for review and interpretation. The G.P.C. asserts in its pleadings that Local 105 did not formally refer this issue to the G.P.C. for determination and that it is required to do so by the terms of the agreement. At the

hearing, in reply argument, counsel for the G.P.C. stated that the G.P.C. was not disputing the Board's jurisdiction to determine the issue.

- The G.P.C. acknowledges that, in the normal course, an arbitration proceeding such as this is a private dispute between the parties, and that strangers to that dispute ought not to be and are not permitted to intervene. It asserts a test for the exception to that rule as whether or not there is a sufficient nexus between the intervenor and the issues in dispute to warrant standing. That test, it argues, has been variously articulated; does a party have a direct connection with the issues in dispute; is the intervenor able to demonstrate it will be directly affected; or, can it demonstrate the necessary degree of interest. It argues that the trend has been to broaden rather than narrow the opportunity for intervention.
- In asserting a right to standing, the G.P.C. also relies on the fact that if the work is performed under the ICI agreement then the G.P.C. would lose monies payable to it under Article 29 of the project agreement; an amount in respect of a Maintenance Industry Administration Fund. It relies primarily on the decision in *Petro-Canada*, *infra*, in this regard and is asserting an interest on its own behalf. It also asserts that there is a potential for conflicting decisions, should this matter only be dealt with between the applicant and responding party. If the applicant herein is successful the G.P.C. asserts, another grievance could be filed under the maintenance agreement, asserting that the work in question was properly under that agreement. If the decision in that grievance found the work to be maintenance, there would be two conflicting decisions, and the only appropriate way to deal with that is to have all parties deal with the issue in one forum, at one time. The G.P.C. also argues that if the applicant is successful in its grievance, the other unions with members working on the same project will effectively and practically be bound by a decision of the Board interpreting the statutory language and ought to be entitled to participate.
- In its pleadings the G.P.C. asserts that it is agent for the I.B.E.W. which has standing as of right in the grievance filed, and that it ought to be granted standing on that basis. At the hearing, the G.P.C. did not appear to rely on this argument. We merely note that while we agree that the I.B.E.W. would have a right to intervene in this grievance, there is no evidence or suggestion that the G.P.C. has any authority to act as agent for the I.B.E.W. in matters arising under the ICI agreement. The evidence is that the G.P.C. only has authority to act as agent for the I.B.E.W. in respect of certain matters concerning the project agreement.
- Dofasco relies on the fact that it is the owner of the project on which the work is being performed, and highlights sections of the project agreement in support; which agreement is, of course, specific to Dofasco. It asserts that it has knowledge of the work being performed and that it will be directly affected by the outcome of the grievance both financially and in its relationship with its contractors. It does not rely on an "amicus curiae" status. It also recognizes that any expertise that Dofasco holds can be made available to the Board through evidence without the necessity of it being made a party to the proceedings.
- 20. Dofasco also asserts that it has an interest in the public policy issue of whether the work is maintenance or construction; that the issue is going to be assessed in respect of work that is Dofasco's design and in a context of how Dofasco has had this work performed in the past. It asserts a considerable financial interest in the outcome of the question of how this work is to be characterized, but recognizes that a financial interest, in and of itself, is insufficient to warrant the granting of standing. However, it argues that the question of financing affects the way in which the work will be done, and thereby the characterization of the nature of the work both now, and for work in the future.
- 21. Dofasco acknowledges that it is not bound to any collective agreement with any trade

and is able to contract the work in question without regard to any collective bargaining relationship. Further, it acknowledges that Dofasco's prime focus is the characterization of the work, not the interpretation of any collective agreement.

- 22. Dofasco relies on a number of cases that arise in the context of jurisdictional disputes in the construction industry. Jaddco supported the position of both the G.P.C. and Dofasco and also asserted that the Board ought to view this as a type of jurisdictional complaint and allow those unions performing the work under the maintenance agreement to participate and defend that opportunity.
- 23. The applicant opposes the granting of standing on the basis that the G.P.C. and Dofasco are strangers to the ICI agreement. Any interest asserted by the G.P.C. either on its own behalf or on behalf of the unions bound to the project agreement, the applicant argues, is indirect or of a commercial nature and does not warrant the granting of standing. The applicant notes the private nature of arbitration proceedings, and, while acknowledging that certain persons may be entitled to standing in that private process, this is not that case. Nor are there reasons for the Board to exercise its discretion to grant standing.
- 24. The applicant notes that there will be no effect on work opportunities here the same local will be called upon to provide members to perform the work there is no transfer of work as between unions, as might occur in a jurisdictional dispute. The applicant argues that the loss of the Administration Fund amount is in the nature of a commercial consequence and is not an interest recognized to warrant standing. The applicant also asserts that any decision on this grievance will affect only Jaddco and Local 105; only those parties will be bound by any decision of the Board, and the project agreement remains unaffected.
- 25. Counsel for the G.P.C. in reply agreed that this is not a jurisdictional dispute. The G.P.C. acknowledges that there is no dispute that the unions are properly performing the work within their respective trades. The same people will continue to perform the work, albeit under a different collective agreement. All the unions bound to the project agreement are also bound to the ICI agreement for their respective trades.
- 26. If the applicant is successful in asserting that this work is construction work properly covered by the terms of the ICI agreement, the effect will be that the members of Local 105 will continue to perform the work, for so long as Jaddco has the contract to perform the work, but under the terms of the ICI agreement. The G.P.C. asserts that that result will apply to all the unions performing work on the same project, and that all will be subject to the terms of the ICI agreement, in circumstances where only Local 105 is taking that position.

* * *

- 27. The G.P.C. relies on a number of arbitration and court decisions to assert that the test for the granting of standing as of right was becoming broader. In addition it asserts that the Board has a discretion to grant standing in appropriate cases, and ought to do so here.
- 28. In Ontario Hydro, [1992] OLRB Rep. Jan. 47, the applicant brought an unfair labour practice complaint against the responding parties as well as two grievances. The Labourers' union sought standing to intervene on the basis that certain of the work complained about had been assigned to it. The responding parties and the Labourers' took the position that the matters ought to be dealt with by way of a jurisdictional complaint. In deciding to allow the unfair labour practice complaint and the "mark-up" grievance to proceed as filed, the Board considered that the issues raised in those applications did not, at least for the purpose of liability issues, raise jurisdictional

issues. The Board declined to hear the work assignment grievance, allowing the parties the opportunity to file a jurisdictional complaint.

- On the issue of standing, the Board did, as a matter of discretion, allow the Labourers' union the right to participate in the matters proceeding. Although citing the Ontario Court of Appeal decision in *C.U.P.E. v. Canadian Broadcasting Corp.*, (1990), 70 D.L.R. (4th) 175, the Board did not make its decision on the basis of whether or not the Labourers' had standing as of right. The Board noted it might be called upon to interpret decisions or agreements made under the Plan for Settlement of Jurisdictional Disputes in Washington in order to decide whether or not the responding parties had abided by them. Those decisions or agreements were the result of a three-party process under the collective agreement which binds both unions. It was in light of that underlying three-party involvement in the collective agreement in issue that standing was granted. We note too that both unions were bound to the collective agreement in issue (the "EPSCA" agreement).
- 30. In *Master Insulators*', [1980] OLRB Rep. Oct. 1477 the applicant was alleging, essentially, that the union responding party was continuing to refer workers to certain member employers, notwithstanding that a legal strike in respect of the ICI collective agreement was in effect. The responding parties took the position that the work in question was not construction work, but maintenance work, and was properly being performed under various maintenance agreements with the G.P.C. The G.P.C. relies on the decision as it participated in that proceeding and asserts that it has the same interest here.
- Inherent in the dispute was a question of whether the various maintenance agreements were an addendum to the ICI agreement or whether they were separate collective agreements regarding maintenance work. The Board noted that the complaint had been framed so as to include the various types of arrangements and conditions under which insulation work was being performed in Ontario, and was in the nature of a test case. No issue of standing was raised. In any event, apart from whether the work was construction or maintenance, the issue was raised as to the very nature and structure of the maintenance agreements whether those agreements violated then section 133(1) of the Act (that there be only one provincial agreement) and therefore whether or not the maintenance agreements were null and void.
- 32. The applicant here is not challenging the form or veracity of the project agreement it acknowledges that that agreement properly exists in respect of maintenance work, and is separate and apart from the provincial agreement. The applicant is seeking to enforce the provincial agreement, an agreement to which the G.P.C. and the other trades are strangers. In *Masters Insulators*', the Board was also not dealing with the arbitration provisions of the Act. The matter arose under the strike provisions of the Act.
- In *Bechtel Canada*, [1978] OLRB Rep. May 401, the Board found that the U.A. had status to bring a request for reconsideration of a direction of the Board on an illegal strike application. The U.A. had not participated in the initial hearing, and the applicant and corporate responding parties took the position that the U.A. would not have been entitled to standing at the initial hearing and ought not to be allowed to bring a request for reconsideration of that decision. However, the broad words of the Board's cease and desist direction, that it affected *any* person having "notice of this *direction*" (emphasis added), caused the Board to conclude that the U.A.'s rights had been affected by the direction.
- 34. The reconsideration application was to deal with the issue of whether someone could be bound to a direction of the Board in the absence of notice of the initial hearing and an absence of participation in that proceeding. It does not stand for the proposition, asserted by the G.P.C., that

if someone is affected by a decision of the Board that warrants the granting of standing. The G.P.C. noted that the original decision in *Bechtel Canada* purported to bind the U.A., although it was not a party to the proceeding. The applicant herein asserts that any decision of the Board in respect of its grievance will not be binding on the G.P.C. or any of its constituent members, except the I.B.E.W. which is also bound to the ICI agreement and is part of its E.B.A. We note that the electricians' employee bargaining agency received notice of this matter.

- 35. The G.P.C. relies on the decision in *Canada Post Corporation*, an unreported decision of Jane Emrich, dated June 28, 1993. The Professional Institute of the Public Service of Canada ("PIPS") filed two grievances. One alleged that persons not in the bargaining unit were performing work of the bargaining unit and sought a cease and desist order. The second grievance alleged that Canada Post had not remitted dues to the union on behalf of those persons performing the work (in essence asserting that the persons performing the work were, in law, employees of Canada Post and in the bargaining unit). Third party contractors sought standing to intervene.
- 36. The intervenors acknowledged that if the issue only required an interpretation of the contracting out language in the collective agreement, then the contractors would not be entitled to standing. Their interests would be the same as Canada Post in that circumstance; reflected by the contractual relationship they shared. However they argued that they had an interest distinct from Canada Post's interest where the union was seeking to have persons they claimed as employees treated as employees of Canada Post. The contractors also took the position that, if granted standing, they would nonetheless not be bound by the results of the arbitration award, nor subject to any of the costs of the proceeding.
- 37. In reaching a decision to grant standing to the contractors involved, the arbitrator relies heavily on the decision of the Ontario Court of Appeal in C.U.P.E. v. Canadian Broadcasting Corporation, supra. There was some disagreement between the parties before us as to the effect of that decision and the subsequent decision of the Supreme Court of Canada in the matter. The arbitrator in Canada Post concludes that the Supreme Court of Canada upheld the Court of Appeal on the "natural justice issue" (page 48), including the Court of Appeal's comments on the issue of standing. With respect, we disagree. The Supreme Court of Canada did not, in our view, uphold the Court of Appeal's comments in that regard. It agreed with the Court of Appeal that there had been a denial of natural justice in not providing notice to two other unions, in circumstances where the grievance inherently raised a jurisdictional dispute between the grieving union and those two unions. The Supreme Court of Canada then specifically stated that no further judicial disposition should be made at that stage.
- 38. Having reviewed the CUPE v. C.B.C. decisions, the arbitrator in Canada Post concludes that "if the relief sought...would or could significantly affect the employment opportunities, contractual advantages, or property of those seeking to intervene, their entitlement to standing does not depend upon whether they would be legally bound by the arbitration award". If the comment is intended to mean, as asserted by the G.P.C. that where a person's employment opportunities, contractual advantages, or property would or could be significantly affected then they are entitled to standing "as of right", we disagree. The statement in our view is far broader than the cases relied on suggest, and ignore the primary, private nature of arbitration proceedings.
- 39. That primary interest is highlighted by the dispute in *Canada Post* over costs. The contractors took the position that, if granted standing, they would not be responsible for any of the costs of the proceeding. The normal requirement is that those costs be shared between the parties to the agreement. This feature reinforces the private nature of an arbitration dispute. The adding of parties to a dispute invariably lengthens the proceedings, making them more costly. It seems an

odd result that the primary parties ought to bear the entire responsibility for that increased cost, particularly in circumstances where the interest of the persons seeking to intervene is not direct and substantial.

- 40. That is not to say that we disagree with the result in that case. PIPS was seeking an order that the contractors or employees thereof be treated as falling within its bargaining unit as employees of Canada Post. Those individuals and their employers would be directly and substantially affected by an award granting that relief. It would result in a transfer of work away from the contractors and the employees in question would not, for labour relations purposes, be treated as employees of the contractor. In that sense it is the same result as flowed in *Petro-Canada Products*, an unreported decision of Paula Knopf, dated January 24, 1990, also relied on by the G.P.C.
- The G.P.C also relies on the decision in *Fanshawe College*, (1991) 19 L.A.C. (4th) 162 (Brent), which is cited in the *Canada Post* decision. In that case the arbitrator concluded that where an employer was ordered to cease and desist from contracting out work, there would be an economic consequence to the contractor. However, that interest would not warrant the granting of standing in the grievance. In the arbitration proceedings, the interest of the employer and contractor are identical both want the collective agreement interpreted in a manner to allow the contracting out. The contractor would also retain any commercial remedies against the employer for breach of contract. However, she concludes that in the case before her, the union was seeking relief which, if granted, would change the existing employment relationships between individuals performing the disputed work and their ostensible employer, the contractor. On that basis, she granted standing to the contractor.
- 42. If Local 105 is successful in this grievance, there will be no altering of any employment relationship. Members of Local 105 will continue to perform the work for Jaddco for so long as Jaddco has the work. In this case, the interests of Jaddco, Dofasco, and the G.P.C. are the same. They each seek to have the work characterized as maintenance, and not construction.
- In a recent and as yet unreported decision, the Board, as a matter of discretion, granted standing to the Metropolitan Toronto Road Builders' Association ("MTRBA")in a grievance involving the Operating Engineers, Local 793 and Canadian Highways International Constructors ("CHIC") (Canadian Highways International Constructors decision of the Board dated December 21, 1995) [now reported at [1995] OLRB Rep. Dec. 1417]. Local 793 and CHIC had entered into a Project Agreement covering work to be performed in the building of Highway 407.
- The grievance alleged that CHIC had not properly paid members of Local 793 for certain overtime work. The project agreement incorporated by reference the terms of local 793's agreement with the MTRBA, as well as other agreements involving other trades. The MTRBA sought standing on the basis that it was the MTRBA agreement that would in effect be interpreted by the Board and that therefore they ought to be entitled to participate. The Board found that the MTRBA had no standing as of right as neither it nor any of its members was bound to the project agreement which was the agreement in issue. Therefore they would not be affected by any decision of the Board as any decision would not be binding on them.
- 45. However, the Board exercised its discretion to grant standing. The panel noted Article 6 of the project agreement which required CHIC to sub-contract work only to companies bound by the applicable Schedule A collective agreements, including the MTRBA agreement. The Board stated:
 - 19. ... The critical factor which leads us to this conclusion is that of the desire to avoid multiple

proceedings and to ensure, to the greatest extent possible, that Board proceedings remedy the question in issue. ...

As was observed by counsel for CHIC during argument, if the MTRBA is denied status to intervene, the decision in this proceeding will bind only Local 793 and CHIC, but not the MTRBA or any of its members. Work which is subcontracted to contractors bound by the MTRBA/Local 793 collective agreement may well deny the applicability of the Board's ruling to the work being performed. Ultimately, we are left with the situation where the Board's ruling in this proceeding may have little practical effect as it binds only CHIC, and not those entities which will actually be responsible for the performance of the work.

- 46. The agreement in issue in this grievance is the ICI agreement. There is no underlying or otherwise incorporated agreement; nor is there any overlap between the ICI agreement and the project agreement. The terms of the project agreement are not being interpreted. While the manner in which that agreement has been applied in respect of different kinds of work may be relevant from an evidentiary perspective, that does not provide a right to standing.
- 47. Harbridge and Cross, [1979] OLRB Rep. Apr. 313 involved a sector determination under then section 135 of the Act. The Board concluded that the issue of standing was to be determined from the words of the statute which referred to "the work performed or to be performed" on a site, and whether the person had a direct connection to the project. Standing was granted to employers and unions or councils of unions which held bargaining rights for employees on the project, and bargaining agencies which represented the employers, trade unions, or employees referred to. The G.P.C. seeks to assert a sector dispute analogy to argue that the Board in this case ought to first determine whether the work is construction or maintenance work. If it is found to be construction, then the G.P.C. has no continuing interest in the grievance and would participate no further.
- 48. West York Construction, [1980] OLRB Rep. Jan. 119 also involved a grievance filed under what is now section 133 of the Act. The Labourers sought standing on the basis that the work in issue was work within the residential sector of the construction industry and was covered by a collective agreement to which it was a party. The applicant asserted that the work was covered by the ICI agreement. The Board noted that in the grievance proceeding between the applicant trade union and the employer, the Labourers' would not be entitled to standing. However, a jurisdictional complaint had been filed, and, the employer took the position that the matter required a sector determination under then section 135 of the Act prior to the grievance proceeding.

49. At paragraph 8 the Board states:

8. As the Board indicated in the Napev Construction Limited case, [1979] OLRB Rep. Sept. 886, the proper parties in considering the merits of a grievance are those which are party to, or bound by, the collective agreement being grieved under. Accordingly, absent any consideration of section 135 it would appear that the intervener would lack status to participate in these proceedings. Section 135, however, does not concern itself with rights under a collective agreement but with "work performed or to be performed by employees". As the Board noted in the Harbridge and Cross Ltd. case, [1979] OLRB Rep. April 313, it follows from this that any trade unions, councils of trade unions, employers and employers' organizations which have a direct connection with the project on which the work is, or will be performed, have a sufficient interest to participate in the proceedings. In the instant case a number of employers, employers' organizations, trade unions and councils of trade unions, which have a direct connection with the Salvation Army Training Centre project, may well be affected by a determination as to which sector the work falls within, even though they would normally lack sufficient status to participate in a hearing as to the merits of the applicant's grievance. In these circumstances, we are satisfied that it would be appropriate to accede to the respondent's request and determine the issue of whether the work in question comes within the industrial, commercial, institutional sector pursuant to the provisions of section 135. ...

- In a sector dispute the Board considers the work in issue in order to determine in which 50. of the defined sectors within the construction industry the work falls, and, only as a consequence, which collective agreement applies. The focus in the statute is on the work performed, and the Board has concluded that in those cases, all persons either performing or directing the work have a direct and substantial interest in the outcome of the dispute, and therefore ought to be given notice and granted standing if sought. There is, however, no equivalent provision in the statute for determining whether work is properly ICI work or maintenance work. The difference between a grievance and the sector determination is highlighted by the fact that the G.P.C. does not suggest that there is anyone else entitled to notice of this proceeding. While the G.P.C. might act as agent for the international unions, the local unions whose members are performing the work and other contractors on site would also be entitled to notice and standing if this were a sector dispute. In this case, the applicant asserts rights under its ICI agreement, independently of any rights held by others who are strangers to that ICI agreement. The statutory provisions for multi-party determinations (noticeably absent in respect of an issue as between construction or maintenance) reinforce the private nature of the arbitration proceeding under section 133 of the Act, particularly given the unique relationships and the statutory structure of province-wide collective bargaining in the construction industry.
- The G.P.C. argues that it will not be able to ignore the Board's decision with respect to whether the work is maintenance or construction because that will involve a statutory interpretation concerning work on the same project where the other unions are working. Any such decision would not be binding on the G.P.C. or other signatories to the project agreement. While any Board decision interpreting the statutory language concerning the meaning of "construction" may well have some bearing on how parties to the project agreement interpret that agreement, the same can be said for any party bound to any collective agreement covering construction or maintenance work. See generally *Ontario Hydro*, [1986] OLRB Rep. May 663 and the cases cited therein.
- 52. In the absence of a sector or a jurisdictional dispute, a union would not be entitled to standing in the grievance of a different trade, where the assertion is that the employer has violated the trade's ICI agreement; notwithstanding the fact that that union might well have a keen interest in the issue of how the work was characterized. It would be free to ignore the results of the grievance of the other trade or it could seek to have the same result apply to it by filing a grievance under its ICI collective agreement with that same employer on the same project. There is nothing new or unusual about that situation. The coordinated effort of the signatories to the project agreement and their creation of an entity called the G.P.C. do not change that.
- The G.P.C. relies on Article 5.200 of the project agreement to argue that a grievance could be filed under that provision that might result in a conflicting decision if standing were not granted to it. Article 5.200 states that the agreement does not cover new construction, which work is agreed will be performed under the applicable construction collective agreement. The article forms part of the scope clause of the project agreement which provides that work performed under the agreement shall be maintenance, repair or renovation work as defined in Article 6. Article 6 gives the G.P.C. the responsibility and *prerogative* to determine whether work is maintenance. The only grievance arguably available under Article 5.200 is the assertion that work is construction and not maintenance. If the G.P.C. has the responsibility and prerogative to decide if the work is maintenance, we are hard-pressed to see how an arbitrator appointed under the grievance and arbitration provisions of the project agreement would have any jurisdiction to determine that the work was not maintenance, but construction. In other words, the only "grievance" available is one that would be determined by the G.P.C. itself.
- 54. The G.P.C. argues that if the grievance is successful, it will lose the Administration

Fund amount under Article 29 of the project agreement. That amount is paid on the basis of cents per hour earned under the agreement, and appears to exist to fund the G.P.C. in performing its responsibilities under the project agreement. Unlike a contractor who loses work when an employer has sub-contracted in violation of the collective agreement, the G.P.C. has no forum in which to pursue any claim for the loss of this amount. However, the very structure of the G.P.C. necessitates this result. It is a creation of the project agreement and the amount lost is in the nature of a commercial consequence.

- Dofasco is not bound to the project agreement. Nor is it bound to the ICI agreement. In the face of a decision determining this work to be construction, it has a number of options, including redesigning the work or having it performed outside this project agreement, subject perhaps to other commercial arrangements. The project agreement recognizes, at Article 5.300, that Dofasco is free to choose to perform or directly sub-contract work for any part or parts of the work necessary in its plant. Its interest in this dispute is, at best, indirect.
- We are of the view that neither Dofasco or the G.P.C. is entitled to standing as of right. Nor are there persuasive reasons why Dofasco ought to be granted standing as a discretionary matter. However, we are of the view that, as a matter of discretion, it is appropriate to grant standing to the G.P.C. The maintenance agreements entered into by the international unions and administered by the G.P.C. have long been a part of a collective bargaining system that has attracted work to the unionized construction industry for the benefit of employers, construction trade unions, and their members. The G.P.C. has been required to turn its collective mind to the issue of how work is to be characterized and has a long and unique perspective as representative of a number of trades in this regard. The remedy sought in this case, if granted, may have significant practical consequences to the integrity of that system.
- 57. We therefore grant standing to the G.P.C. on the issue of whether the work is construction or maintenance work. Standing is not granted to Dofasco.
- 58. This matter is hereby referred to the Registrar to schedule a hearing for the purpose of hearing the evidence and submissions of the parties with respect to any matters remaining in dispute. This panel is not seized.

4174-93-R La Co-operative De Pointe-Aux-Roches, 1015195 Ontario Limited and Charles Desmarais, Applicants v. United Food and Commercial Workers International Union, Local 278W, and The United Brotherhood of Carpenters and Joiners of America - Local 3054, Responding Parties v. United Co-operative of Ontario and UCO Petroleum Inc., Intervenors v. Group of Employees, Objectors

Sale of a Business - Co-op engaged in business of supplying farm inputs and services and in merchandising grain acquiring certain other unionized operations in series of transactions - Employer making sale of a business application and asking Board to rationalize (and potentially eliminate) its collective bargaining obligations - Parties disputing whether employees intermingled - Board assuming but not finding intermingling and concluding that such intermingling not of the "thorough" nature that would lead Board to intervene - Board noting that current bargaining structures not ideal but still viable - Employer's application under section 64(6) of the Act dismissed

BEFORE: Jerry Kovacs, Vice-Chair, and Board Members S. C. Laing and B. L. Armstrong.

APPEARANCES: Theodore Crljenica, Charles Desmarais and Evert Geelen for the applicants; Joanne L. McMahon, John Hammond, Wayne Lee for the United Food and Commercial Workers International Union, Local 278W; Mike McCreary, Ken Fenwick, Rose Talbot and Ralph Anderson for the United Brotherhood of Carpenters and Joiners of America - Local 3054; no one appearing for UCO Petroleum Inc.; no one appearing for the Group of Employees.

DECISION OF JERRY KOVACS, VICE-CHAIR, AND BOARD MEMBER B. L. ARMSTRONG; BOARD MEMBER S. C. LAING RESERVING HER DECISION; April 12, 1996.

- 1. This is an employer application made under sections 1(4) and 64 (now section 69) of the Labour Relations Act. None of the changes to the Act effected by Bill 7 appear relevant to the issues before us at this stage in these proceedings.
- 2. The case concerns a number of transactions effected by the applicants in 1993, whereby La Co-operative de Pointe-Aux-Roches ("the Stoney Point Co-op") acquired certain operations of Harrow Farmers Co-operative Association Limited ("Harrow") and United Co-operatives of Ontario ("UCO") in and around the area of Essex County. For the Stoney Point Co-op's part, the transactions were managed by its principal, Charles Desmarais, through a numbered company (1015195 Ontario Limited) incorporated for the sole purpose of those acquisitions.
- 3. Some issues were resolved at the hearing. The responding parties ("the Carpenters" and "the UFCW") did not challenge the applicants' contention that the Stoney Point Co-op, 1015195 Ontario Limited and Charles Desmarais were related employers within the meaning of subsection 1(4), and the Board accordingly declares that they are one employer for the purposes of the *Act* (and we refer to them hereinafter collectively as "the Stoney Point Co-op" or "the employer"). The Carpenters agreed that the transaction between Harrow and the Stoney Point Co-op (a managerial transfer in May of 1993, formalized on December 1, 1993) constituted a sale of business within the meaning of section 64. And the UFCW agreed that the transaction between UCO and the Stoney Point Co-op (a managerial transfer in May of 1993, formalized on December 1, 1993) constituted a sale of business within the meaning of section 64. Indeed, the employer has continued to abide by the collective agreements that were in place between these two unions and the predecessor employers, pending the outcome of these proceedings.
- 4. Finally, the employer retreated from its initial position that the Board ought to terminate the two unions' bargaining rights. Instead, the employer asks the Board to find that an intermingling of employees has occurred and seeks orders that would rationalize (and potentially eliminate) its collective bargaining obligations. Its goal is to reduce the various existing bargaining units to a single all-employee' unit, and to offer its employees a choice between representation by one of the existing bargaining agents or no representation by any bargaining agent.
- 5. The issues before the Board, then, are whether there has been an intermingling of employees; what, if any, is the appropriate bargaining unit or bargaining units that should exist; whether the Carpenters and UFCW collective agreements should continue to operate and the unions' bargaining rights continue in effect; and whether the 3-way representation vote requested by the employer should be ordered.
- 6. These proceedings included a challenge by the the Carpenters and the UFCW to the constitutional jurisdiction of the Board to hear the matter. In a decision dated February 3, 1995,

the Board (by a differently constituted panel) determined that it had jurisdiction and directed that the matter proceed to a hearing on the merits of the application.

- 7. In that February decision, the Board reviewed the nature of the operations of the Stoney Point Co-op, Harrow and UCO, as well as the sequence of transactions between them, and we rely upon the facts set out therein (with a minor correction noted by the employer prior to the transactions, the Stoney Point Co-op employed 43 or 44 persons, rather than 50 as stated in the February decision). Prior to the continuation of the proceedings before this panel of the Board, the parties and their counsel were able to reach agreement on a detailed statement of the further facts necessary to the determination of the outstanding issues.
- 8. The Stoney Point Co-op, Harrow and UCO were each engaged in the business of supplying farm inputs and services (e.g., seed, fertilizer, pesticides, feed, hardware, bulk petroleum) and merchandising grain. To some extent, the three competed for similar business. Prior to the transactions, the Stoney Point Co-op operated at 3 locations:
 - (1) Stoney Point included the head offices, a seed cleaning mill, grain elevators and silos, a workshop, a farm supply retail store, and warehouses.
 - The 23 employees included truck drivers delivering grain and fertilizers, truck drivers delivering bulk petroleum, store salespersons, a grain salesperson, an agronomy salesperson (involved in the sale of chemical, seed, feed and fertilizer to farmers along with the rendering of general advice), elevator workers, yard workers, accounting clerks, and a systems co-ordinator.
 - (2) At *Belle River*, the Co-op operated a gas bar, a convenience store, a car wash, and a garden centre, and maintained a feed warehouse.
 - The 18 employees were part-time sales clerks and gas bar attendants.
 - (3) Rochester Township was a small operation consisting only of a grain elevator.

The 2 employees were grain elevator workers.

None of the employees of the Stoney Point Co-op were represented by a trade union.

- 9. Prior to the transactions, Harrow operated at 2 locations:
 - (1) Harrow, in the Town of Harrow, consisted of a feed mill, a feed warehouse, grain elevators and silos, a bulk petroleum depot, a retail store and a machine shop. This facility was similar to the main Stoney Point location operated by the Stoney Point Co-op. However, it did not engage in bulk petroleum sales.
 - The 6 employees included a grain salesperson, a sales/data clerk, a gas bar attendant (also working as store salesperson, an elevator worker, and a driver.
 - (2) McGregor was a small branch operation consisting of a grain elevator

and silos, a feed warehouse, and a store from which the feed was sold. Also located on the premises was a retail store, leased and operated by an independent operator. (The lease was terminated and the store closed after the transactions with Stoney Point Co-op).

There was one employee, Ralph Anderson. He occasionally also worked at the *Harrow* location, filling in as a driver or elevator operator in the absence of a regular employee.

The employees of these 2 locations comprised a single bargaining unit (all employees at Harrow and McGregor) represented by the Carpenters. The Carpenters have represented this bargaining unit since 1964, and bargained (without strike or lockout) a continued succession of two-year collective agreements with Harrow until the transaction with the Stoney Point Co-op.

- 10. UCO operates many locations throughout the province. Five locations were the subject of the transactions with the Stoney Point Co-op:
 - (1) Cottam was the largest facility, with administrative offices, bulk petroleum sales, a seed cleaning mill, a feed warehouse, a farm supply retail store, grain elevators and silos, a fertilizer depot, chemical storage, and a workshop.
 - (2) Arner was a small facility operated as a branch of the Cottam operation, and consisted of a grain elevator and silos, and a small office.
 - The 8 employees of the Cottam and Arner sites included an agronomy salesperson, a grain salesperson, yard workers, elevator workers and a data clerk.
 - (3) The *Kingsville* operation included a large retail store, a feed warehouse, a fertilizer warehouse and blender, a pesticide warehouse and a gas bar.
 - The 5 employees were store clerks and gas bar attendants.
 - (4) Oldcastle was similar to the Kingsville operation, consisting of a large retail store, grain silos, a fertilizer warehouse, a feed and seed warehouse, and administrative offices.
 - The 7 employees included an agronomy salesperson, office and store clerks, and yard employees.
 - The Stoney Point Co-op acquired only the retail store and fertilizer outlet.
 - (5) *Comber* was a small operation consisting of a single elevator, a retail store and a fertilizer outlet.

There were 5 employees.

Stoney Point Co-op acquired only the elevator, and assumed the employment of the operator. The other parts of the location remain as a UCO operation, with 4 employees.

These 5 UCO locations included 3 separate bargaining units, each represented by the UFCW, Local 278W. The Cottam and Arner sites were subject to one collective agreement (covering all employees at Cottam), the Kingsville site was subject to another agreement (covering all employees at Kingsville), and the Oldcastle site was subject to yet another collective agreement (covering all employees at Oldcastle). The Comber site was not subject to any of the 3 collective agreements.

- 11. For that part of its business consisting of bulk petroleum sales, UCO had entered into an arrangement with Sunoco Petroleum that resulted in the creation of a corporation called UCO Petroleum Sales ("UPI"). UPI subsequently carried on the bulk petroleum sales functions. A UCO employee performed the related work, and UCO billed UPI for his labour costs. In addition, UPI used the services of truck drivers with an independent contractor (Carl Gyori Petroleum).
- 12. After the transactions, the Stoney Point Co-op moved to consolidate and integrate its enlarged operations. It centralized administrative operations and rationalized the sale and distribution of its products and services. In particular:
 - (1) Employment and labour relations matters are managed centrally from the Stoney Point location.
 - (2) Accounting for all locations is done at the Stoney Point location, for the most part by employees who were located there prior to the transactions. Before the transactions, Harrow did accounting functions at the Harrow location, and UCO did accounting functions at its head office in Mississauga.
 - (3) Grain marketing is now handled centrally at the Stoney Point location. A Grain Marketing Manager markets grain for all locations, working in conjunction with branch managers. Grain elevator operators (whose positions do not fall within any bargaining unit) were formerly stationed at a particular elevator. Stoney Point Co-op now shifts them between locations from time to time, since an elevator may not be operational on certain days due to weather conditions at that particular site.

Although grain may be sold through a particular location, delivery is performed by drivers working out of the Stoney Point location, or by contract haulers. Prior to the transactions, delivery was performed out of each location.

Stoney Point Co-op arranges for pick-up of grain from farmers (25% of its grain is obtained by pick-up as opposed to drop-off by the farmer). The pick-up work is performed by Stoney Point drivers or by independent contractors engaged by the Stoney Point office. Prior to the transaction, Harrow did not offer such a service; UCO did offer pick-up through an independent contractor.

(4) The purchase and distribution of seed is now managed centrally by the Stoney Point branch manager. Despite relationships that customers might have had in the past with a particular Harrow or UCO location, seed delivery is now done through whichever of the Stoney Point Co-op locations is closest to the customer.

- (5) The purchase and distribution of fertilizer is now managed centrally by the Cottam branch manager. Customer delivery is done by whichever Stoney Point Co-op location is closest to the customer.
- (6) The purchase and distribution of pesticides is now managed centrally by the Harrow branch manager. Customer delivery is done by whichever Stoney Point Co-op location is closest to the customer.
- (7) There is now a single feed mill, at the Harrow location, for the entire Stoney Point Co-op operation. The Harrow location sells some of the feed itself, but distributes the majority of the feed to other Stoney Point Co-op locations for sale by those branches.
- (8) The McGregor site is now used as a warehouse for the entire enterprise. That use reflects the second transformation of the location since the transactions. Initially, for the first year following the transactions, the employer used the site as a storage facility for industrial lubricants which it markets to industrial customers in Windsor; delivery to Windsor was done by drivers from the Stoney Point location.
- (9) Bulk petroleum sales and deliveries have been consolidated and centralized, and are handled through the Stoney Point location. Seven drivers are now dispatched from that site. Before the transactions, Stoney Point Co-op and UPI (the UCO joint venture with Sunoco) were in competition for business in Essex County. Subsequent to the transactions, Stoney Point Co-op entered into a joint venture agreement with UPI. Stoney Point Co-op has a controlling interest in the venture and manages UPI business in Essex County. In assuming the former business of UPI, the Stoney Point Co-op also assumed the employment of the drivers working with Carl Gyori Petroleum.

Stoney Point Co-op has rationalized customer service, dividing the County into districts. Regardless of a customer's prior relationship with either UPI or Stoney Point Co-op, the customer is now served by whichever driver works in the district; and when in need of immediate delivery, a customer can by-pass the main office and seek delivery from the closest available driver.

- (10) The employer now offers high-clearance pesticides application equipment at a variety of locations, including Cottam and Harrow. Prior to the transactions, UCO (e.g., Cottam) did not have such equipment.
- (11) The employer now uses the service of an intra-company courier, who works out of Stoney Point. The courier transfers product between branches.
- (12) Stoney Point Co-op closed the former UCO operation at Kingsville (a UFCW bargaining unit location).

The employer states it intends to continue to develop the integration of locations.

13. The key dispute between the parties is whether the Stoney Point Co-op has "intermingled the employees" of Harrow and UCO with each other and/or with the employees of the former version of the Stoney Point Co-op as a result of this corporate reorganization. The parties' representations addressed the following evidence of personnel transfers:

Affecting bargaining unit employees:

(1) Ralph Anderson was the sole employee at the McGregor warehouse (in the Carpenters' bargaining unit). While the Stoney Point Co-op used the site to warehouse industrial lubricants, Anderson would assist in loading and unloading trucks, working along side the Stoney Point drivers (who are not represented by any bargaining agent). The employer characterizes this as Stoney Point, or non-bargaining unit, work.

Anderson also worked for a few days in 1993 driving a high-clearance fertilizer application vehicle out of the Cottam location (one of the UFCW bargaining units); and in 1995 he worked 9 or 10 days at Oldcastle (another of the UFCW bargaining units), mixing fertilizers and helping with deliveries.

These latter assignments were on a voluntary basis, as Anderson sought out extra hours of work.

- (2) Joe Wilson, a member of the UFCW bargaining unit at Cottam, was reassigned to operate the high-clearance application equipment (not claimed as bargaining unit work, but Wilson nonetheless remained within the bargaining unit).
- (3) Mike King, part of the UFCW bargaining unit at Oldcastle, worked for 5 days in 1995 at a Chatham location rented by the employer; he also once worked a 7 or 10 day period at Comber (non-union former UCO location) with the consent of the UFCW.
- (4) Deborah Galos, a member of the UFCW bargaining unit at Oldcastle, was transferred to Cottam, a different UFCW bargaining unit.
- (5) Barbara Tallent, formerly the grain clerk at Cottam (a UFCW bargaining unit position), was transferred to Stoney Point (no bargaining unit) and is now the grain clerk for the entire enterprise.
- (6) Rose Talbot, both before and after the transactions, was and continues to be the data entry clerk at Harrow (a Carpenters' bargaining unit position). However, she now works at Stoney Point (no bargaining unit) each month, for 2-3 day periods, assisting with month-end accounts receivable.
- (7) Sherry Amante was the data clerk at Cottam (a UFCW bargaining unit position). She was transferred to Stoney Point (no bargaining unit) to perform dispatch and clerk duties for the enterprise-wide bulk petroleum business. The vacancy at the Cottam position has not been filled.

- (8) Russ Renaud was the truck driver at Cottam (UFCW bargaining unit), delivering bulk petroleum for UPI. Initially, Stoney Point Coop did not assume that bulk petroleum business and therefore did not assume Renaud's employment; he remained a (UFCW bargaining unit) employee of UCO. However, when Stoney Point Coop later entered into a joint venture agreement with UPI, Renaud was hired and transferred to Stoney Point (where there is no bargaining unit), working as one of the 7 bulk petroleum drivers dispatched out of Stoney Point. UFCW does not claim his work as within any of their bargaining units.
- (9) Although Stoney Point Co-op did not acquire the grain elevator operated by Oldcastle, it did assume the employment of UFCW bargaining unit member Gary Shepley. Shepley was eventually transferred to Cottam (a different UFCW bargaining unit).
- (10) When Stoney Point Co-op closed the former UCO operation at Kingsville (a UFCW bargaining unit), it laid off 4 of the 5 employees. One of the employees, Jason Hamel, was transferred to Oldcastle (a different UFCW bargaining unit).
- (11) At the time the Kingsville operation was closed, the employer assigned employees from Oldcastle, Harrow, Belle River and Comber to remove stock and inventory from Kingsville and to distribute it to other locations.
- (12) Gary Shepley, a member of the Cottam UFCW unit, worked for 3 days in July of 1994 at the McGregor site (a Carpenters unit) to fill in for Ralph Anderson, who was attending a hearing in these proceedings before the Board. This occurred with consent of the parties.

Affecting only non-bargaining unit employees:

(13) The employer transferred Stoney Point agronomy salesperson Richard Thibert to Harrow, then to Oldcastle, and eventually back to Stoney Point.

Agronomy sales is not bargaining unit work.

- (14) Harrow's controller, Charlie Quenneville, was transferred to Stoney Point. His is not bargaining unit work.
- (15) Andre Mailloux, formerly a Stoney Point employee (non-union), was transferred to Cottam (where UFCW has a bargaining unit) for the 7-month period during which the employer had moved high-clearance applicator equipment to Cottam; Mailloux operated that equipment. That work was not claimed as within the UFCW bargaining unit.
- (16) Alex Micinski, once the agronomy salesperson (non-bargaining unit) at Oldcastle, was transferred to Cottam to operate the high-clearance pesticide applicator. He was subsequently transferred to perform

that work at Harrow (not work claimed within the Carpenters' bargaining unit). Later, he was promoted to a management position at Harrow.

- (17) Marianne Bonneau, formerly the grain clerk at Stoney Point (non-union) was reassigned when Barbara Tallent moved to Stoney Point. Bonneau is now responsible for grain wholesaling, at Stoney Point.
- (18) Before the transactions, UPI also used the truck services of the independent contractors (i.e., these drivers were not employees of any of the three companies) with Carl Gyori Petroleum for the delivery of bulk petroleum. Stoney Point Co-op now employs those persons as part of the 7-person crew that is dispatched out of Stoney Point to deliver bulk petroleum (non-union).
- (19) From the UCO Comber location (non-union), Stoney Point Co-op initially acquired only the grain elevator. It assumed the employment there of Mark Wright. Mark Wright later became a courier for the new enterprise, working out of Stoney Point (non-union). In one month of 1993 he was occasionally assigned to work at Comber (non-union former UCO location).
- (20) Stoney Point Co-op later acquired the other UCO operations at Comber (non-union), assuming the employment of employees there. One of the employees, Gary Geelen, was transferred to Stoney Point (also non-union). Later, Geelen's time was split between Stoney Point and Comber.

The parties acknowledge that changes have occurred with the co-operation of the trade unions or, at least, without challenge by the trade unions (e.g., the trade unions have stated that they are not claiming that new work like the operation of high-clearance application equipment should fall within the scope of their "all-employee" collective agreements; and they have not objected where the employer has transferred an employee out of one bargaining unit into another).

- 14. The employer describes these personnel movements as examples of "employee-specific" intermingling, and asks the Board to recognize them as indicators of an "intermingling of employees" within the meaning of subsection 64(6). However, it takes the further position that intermingling has occurred as a result of the integration of the businesses, and that such a finding is contemplated by the statute even in the absence of employee-specific integration. In its submission, the employer requires a remedy that allows it flexibility in employee mobility throughout its reorganized, integrated and rationalized enterprise, as opposed to the constraints of the existing collective agreement enclaves that developed in the pre-existing scenario of independent competing businesses. The employer suggests that a multi-unit bargaining structure makes no sense in the new enterprise, and that it presents serious labour relations problems. It submits that a single all-employee bargaining unit is the only appropriate one in the new circumstances.
- 15. The trade unions submit that the evidence of personnel movement contains few relevant instances of employee intermingling. They point out that a number of the examples involve non-bargaining unit and managerial persons (and thus do not deal with intermingling of "employees"). that others involve non-bargaining unit work, that others involved merely voluntary assignments, and that others merely show accretion to their bargaining units. They contend that these are not relevant to the assessment of employee intermingling. In their submission, the actual examples of

employee intermingling are too insignificant to be relied upon. They also note that the personnel movement has, to a large degree, occurred with the co-operation of the trade unions. They ask the Board to find that no intermingling within the meaning of subsection 64(6) has occurred. In the alternative, if the Board finds intermingling, the trade unions submit that the existing bargaining structures remain viable and appropriate and that the Board ought not to exercise its discretion to order a representation vote of any sort, given that the primary purpose of section 64 is to preserve bargaining rights.

- 16. The first issue to be determined is whether the facts disclose "intermingling of employees" as contemplated by section 64. We start by noting that the provisions apply with respect to "employees" and that, pursuant to section 1(3) of the *Act*, those who exercise managerial functions are not "employees". Accordingly, the Board focuses upon intermingling at the level of affected bargaining unit employees rather that with the movement of managers or changes in managers' roles. (See *New Dominion Stores Inc.*, [1986] OLRB Rep. Apr. 519, at para. 20.) Thus, examples of managerial changes (like the one involving Charlie Quenneville) do not support the applicant's suggestion of "employee-specific" intermingling.
- We are also of the view that, when considered in isolation, temporary or one-time assignments of employees for the purposes of effecting the transfer of certain functions from one location to another, or to facilitate the integration of operations for the new enterprise, do not constitute the sort of intermingling contemplated by section 64. (See, for example, *Parkwood Hospital*, [1980] OLRB Rep. May 759 and *The Brantford General Hospital*, [1994] OLRB Rep. Aug. 1103, where the Board has indicated that it looks for regular interchange of employees as opposed to occasional assignments.) Into this category fall the examples of work performed by Ralph Anderson, Mike King, and the employees who assisted in the closure of the Kingsville location. In a similar vein, transfers which have resulted in accretion to the current bargaining units have not caused representational problems of the sort that the intermingling provisions are designed to address. Into this category fall certain transfers involving Deborah Galos, Gary Shepley, Jason Hamel and Alex Micinski. None of these changes have caused a conflict in bargaining rights, and none have raised any issue regarding the definition of either bargaining unit.
- After subtracting these examples from the list of personnel movements, there remains only minimal evidence of the purported "employee-specific intermingling". These involve transfers of bargaining unit members to non-bargaining unit positions (Thibert's assignment to agronomy sales, Tallent's reassignment to the Stoney Point office, Amante's reassignment to head office, Talbot's occasional work at the head office, King's occasional work at Chatham and at Comber, Anderson's work related to warehousing of industrial lubricants), or transfers within a bargaining unit (Wilson continued to be treated as a bargaining unit member once reassigned to high-clearance applicator work), or transfers that do not involve a claimed bargaining unit position or person (Mailloux, Bonneau, the drivers formerly with Carl Gyori Petroleum, Mark Wright, Gary Geelen). None of these changes involve conflict of bargaining rights. And to the extent that some of the changes may affect a bargaining unit, no dispute has arisen amongst the parties. Neither union has raised any concern regarding movement of bargaining unit members or of bargaining unit work into a non-bargaining unit location. Similarly, neither union has challenged assignment of new' work to non-bargaining unit persons (e.g., the operation of high-clearance application equipment from Stoney Point to Cottam and Harrow), despite the "all-employee" definition of bargaining rights.
- 19. Do these facts present an "intermingling of employees"? The obvious situation that the intermingling provisions are intended to address was described by the Board in *New Dominion Stores Inc.*, [1986] OLRB Rep. Apr. 519 as:

"...a situation in which there is a *de facto* overlap or merger of bargaining units, so that it is difficult to preserve bargaining rights in the "like unit" without creating operational problems for the successor employer or prejudicing the established rights of the employees. It would make no sense if employees working side by side performing similar tasks were subject to different collective bargaining regimes. In such circumstances, it might also make sense to direct a representation vote to determine which of two unions the employees wish to represent them..." [the reference to "like unit" reflects the language of subsection 64(2) as it read prior to amendment by Bill 40 and now reads after passage of Bill 7.]

20. The applicant argues that the Board has held that an intermingling within the meaning of section 64(6) may occur even in the absence of employee-specific intermingling, and even where there is no conflict in the scope clauses of the affected collective agreements (i.e., even in the absence of employees working side by side subject to different collective agreements). In support of its position, the applicant refers to *The Brantford General Hospital*, *supra*, at para. 35:

In Caressant Care Nursing Home of Canada Limited, [1984] OLRB Rep. August 1060, the Board considered what section 64(6) [then 63(6)] was meant to address and stated as follows:

32. ... It is true that the subsection speaks of the purchaser intermingling the employees of one business with those of another. But that appears to be simply a more precise way of referring to the intermingling of the businesses themselves: it is in fact the "employees" of the businesses who are capable of being "intermingled". The focus of section [64] is on the business, and it is the practical problem of running two integrated businesses, either each ostensibly under a different collective agreement, or one under a collective agreement and one "non-union", which would appear to have prompted the Legislature to provide the relief contemplated by subsection 6...

Reflecting the Board's view in *Caressant Care* in *Kitchener-Waterloo Hospital*, [1991] OLRB Rep. Oct. 1130, in a situation similar to the one in this case, the parties agreed there had been "intermingling" within the meaning of section 64(6) even though there had been *no* intermingling of employees.

- 21. In this case, the facts disclose employee movement and reorganization of the enterprise. Because of the protracted litigation of this matter and the agreement of the parties to consider facts covering the period of time up to the most recent hearing, those facts covered a lengthy period (close to 2 years) following the transfers that constituted the sales of business. Notably, those facts did not include any plan for eventual regular employee interchange between the branches of the employer's enterprise. Instead, the employer argued that the list of employee movements described above, together with the evidence of substantial reorganization of the enterprise, should lead the Board to conclude that the existing collective agreement enclaves fettered the employer's operations and prevented regular employee interchange.
- 22. In the applicant's submission, the primary question for the Board is whether the operational integration of the merged entities gives rise to the labour relations problems that *may* be addressed by subsection 64(6). That may be a fair extrapolation of the Board's approach in *Caressant Care, Kitchener-Waterloo Hospital* and *The Brantford General Hospital*, and it would lead us to conclude that intermingling had occurred in this case. But even if operational integration is not the threshold determination in finding that subsection 64(6) applies in a particular sale of business, it is clearly the key issue in determining whether the Board ought to exercise its discretion to restructure or eliminate bargaining rights. In this case, we are not persuaded that the Board ought to intervene in existing bargaining structures even if there was intermingling of employees.
- 23. We start from the proposition that the Board should preserve the established bargaining structure unless there are compelling reasons to do otherwise; this assumption stems from the primary purpose of section 64, which is the preservation of employees' bargaining rights upon the

transfer of a business. (See *City of Peterborough*, [1979] OLRB Rep. Feb. 133; and *Parkwood Hospital*). The Board must assess the labour relations impact of the intermingling to determine whether there are problems serious enough to require restructuring of existing bargaining relationships. To the extent that this requires the Board to assess the appropriateness of the Carpenters' and the UFCW's bargaining units, we note that this inquiry is not identical to the one we would undertake at the point of an application for certification. As the Board said in *City of Peterborough*, *supra* at para. 13:

"... while the remedial scope of the section allows the Board to engage in an assessment of what is the appropriate bargaining unit the criteria to be applied are not identical to those which obtain in an application for certification of previously unrepresented employees... In the fashioning or amending of bargaining units under section 55 of the Act the Board must give effect to existing bargaining rights to the extent that those rights can be reasonably accommodated within the new employer's administrative structures."

In addition, the Board described the careful approach that it must take with respect to existing bargaining structures:

A particular concern in the determination of bargaining units under section 55 of The Labour Relations Act is that existing bargaining structures not lightly be interfered with. The Board recognizes the full value of a bargaining unit that has developed through a succession of collective agreements. A bargaining structure with some substantial history to it often indicates a sound bargaining relationship. More often than not it has evolved through increased communication between union and employer and has come to reflect a workable pattern of mutual expectations between union and employer. Since the promotion of sound collective bargaining relationships is what the Labour Relations Act is all about, the Board is understandably reluctant to dismantle a bargaining structure that has withstood the test of time.

- In the applicant's submission, the Stoney Point Co-op has demonstrated that it no longer maintains the previously independent (or "stand-alone") operations of Harrow and UPI as distinct businesses. The functions of each location have been rearranged to meet the employer's goal of treating each location as a satellite or branch of the greater enterprise, with each site providing an array of services to the customers closest to it, and with some sites obtaining primary responsibility for certain enterprise-wide functions (e.g., grain marketing from Stoney Point, fertilizer distribution from Cottam, pesticides distribution from Harrow). In the applicant's submission, the existing geographic-specific units are no longer appropriate for bargaining. However, this is not an initial application for certification in which the question revolves around a proposed bargaining unit. Here the question is whether the Board should intervene in long-standing bargaining structures.
- The Board has described the mischief to which the Act's intermingling provisions are aimed. In *The Corporation of the City of Peterborough*, [1984] OLRB Rep. Dec. 1752 at para. 10, the Board commented that "...an order under subsection 63(6) [now s. 64(6)] should be limited to circumstances where the exercise of management rights pursuant to a sale results in an intermingling so thorough or so sudden that it is impractical to resolve the resulting representational problems by means of collective bargaining." On the facts before us, we cannot conclude that the intermingling of employees (if it is the sort contemplated by subsection 64(6)) has caused labour relations problems so serious as to require dismantling of existing bargaining structures. The list of personnel movements does not disclose the sort of "employee-specific intermingling" that triggers representational issues. And while it is true that the employer no longer maintains the former UCO and Harrow sites as the stand-alone operations they once were, the evidence indicates that most employees continue to treat the pre-sale location as their workplace. The integration of locations has resulted in few job opportunities beyond the pre-existing collective bargaining enclaves. Although the employer has shifted some equipment and job functions between locations, it has not

demonstrated a plan to regularly assign employees from one location to another. Assuming there is inter-mingling of employees, it is not of the "thorough" nature that would lead the Board to intervene under subsection 64(6). (See *City of Peterborough*, [1984], at para. 10.)

- Although the bargaining structures may not be ideal, they remain viable. The lack of dispute between the employer and the bargaining agents in effecting the changes to date, and the lack of any clear plan for regular employee interchange between locations, indicate that the geographic-specific bargaining units remain workable at this time. The unions have not objected to accretion or deletion in respect of any of the units, and have not raised any issue regarding the minimal movement of new work into bargaining unit locations. We do not find insurmountable administrative difficulties for the employer. All of these are issues that can be addressed in the cooperative fashion shown thus far, and that can be further addressed at the bargaining table in renewal of the existing collective agreements.
- 27. For these reasons, the employer's application for relief under subsection 64(6) is dismissed. The geographic-specific bargaining units remain intact and the employer remains bound to the collective agreements with the responding parties.

2768-95-R United Food & Commercial Workers, Local 206 Chartered by the United Food and Commercial Workers International Union, CLC, AFL-CIO, Applicant v. Lionhead Golf & Country Club, Division of Kaneff Properties Limited, Responding Party

Bargaining Unit - Certification - Union seeking to represent bargaining unit of food and beverage staff at golf club, and to exclude from unit pro shop staff and grounds maintenance employees - Board finding that golf club operating as integrated enterprise and that lines dividing work of the various group blurred - Union's proposed bargaining unit held not appropriate - Application withdrawn with leave of the Board

BEFORE: Gail Misra, Vice-Chair, and Board Members R. M. Sloan and H. Peacock.

APPEARANCES: Pierre Sadik, Frank Kelly, Diana Garvie, Michelle Wisjman and Kim Paterson for the applicant; G. F. Luborsky, H. W. Tseung, K. J. Soden, C. N. Turner and H. L. Fernandes for the responding party.

DECISION OF VICE-CHAIR GAIL MISRA AND BOARD MEMBER R. M. SLOAN; April 10, 1996

- 1. On March 5, 1996 the Board issued a "bottom-li e" decision for Board File No. 2768-95-R, an application for certification. These are the reasons for that decision.
- 2. The applicant (the "union") is seeking a bargaining unit comprised of the food and beverage staff of the golf club, and described as follows:

All employees at the Lionhead Golf and Country Club, Mississauga Road, Brampton, Ontario, working as Waiters/Waitresses, Kitchen Help, Dishwashers, Bartenders and Maintenance Help,

save and except Sous Chef, Assistant Dining/Beverage Managers, and persons above the rank of Assistant Dining/Beverage Manager, Sales Staff, Office and Clerical Staff.

3. The responding party (the "employer" or "Lionhead") suggests the union's proposed bargaining unit is not an appropriate one, and suggests as appropriate an "all employee" unit of the following bargaining unit description and comprised of the food and beverage staff, the pro shop staff and the grounds maintenance employees:

All employees of the respondent employed at the Lionhead Golf & Country Club in the City of Brampton, save and except Supervisors and persons above the rank of Supervisor, Sous Chefs, Executive Sous Chef and Executive Chef, Sales Staff, and Office and Clerical Staff.

<u>Clarity Note:</u>: Supervisors and persons above the rank of Supervisor includes all Managers, Assistant Managers, Assistant Head Pro and Golf Pro Superintendent.

- 4. In support of its position the employer called three witnesses to give evidence. The union called one witness. In addition to the testimony, the Board has before it one exhibit entered during the course of the proceeding. In making the findings and reaching the conclusions set forth in this decision, the Board has duly considered all of that oral and documentary evidence, the submissions of counsel, and the usual factors germane to assessing evidentiary credibility and reliability, including the firmness and clarity of the witnesses' respective memories, their ability to recall matters and to resist the influence of self-interest when giving their evidence, the internal and external consistency of their evidence, and their demeanour while testifying. The Board has also assessed what is most probable in the circumstances of the case, and considered the inferences which may reasonably be drawn from the totality of the evidence.
- 5. In reaching our decision, we have considered all of the evidence, the submissions, and the jurisprudence relied upon by the parties. For the reasons set out below, the majority concluded that the bargaining unit proposed by the applicant is not appropriate for collective bargaining purposes.

THE FACTS

- 6. Lionhead Golf and Country Club is a public golf and country club. It is one of three golf clubs owned by Kaneff Properties Limited ("Kaneff"), which together form a Golf Course Division of that company. As a public club, in contrast to a private club which is membership supported, Lionhead takes reservations from the public who wish to play golf. It also markets its facilities for golf tournaments, parties, and weddings. The club provides valet parking for all golfers, and there are two skill levels of eighteen-hole golf courses available. The only membership component of the operation is that range memberships are available for use of the driving range. The golf course is operational from around March to December, weather permitting.
- 7. Mr. Henry Tseung is the General Manager and Comptroller of the Golf Course Division of Kaneff Properties Limited. He was hired during the last golf season and began to work on July 21, 1995. He oversees the operation of the Lionhead Golf and Country Club, the Streetsville Glen Golf Club, and the Carlysle Golf and Country Club.
- 8. Lionhead is the headquarters for the Golf Club Division, and Mr. Tseung is based there. All of the departments of Lionhead are answerable to Mr. Tseung in his capacity as General Manager. While there has been some movement of management employees between the golf courses, no non-management employees have moved to any of the other golf courses from their home golf course. It was in August and September that Mr. Tseung began to plan for the restructuring of Lionhead. After some consultation with various managers, Mr. Tseung has changed the

chain of command and is in the process of putting in place a new management structure for Lionhead. In the 1995 season the following positions were responsible to the General Manager: The superintendent (in charge of the greens operations), the food and beverage manager, the director of golf, and the accounting manager. Following his taking over as the General Manager in July, 1995, the food and beverage manager, the host golf pro and the director of golf left their employment at Lionhead. For the 1996 season Mr. Tseung has changed the management structure so that the director of golf position is eliminated, and instead, in addition to the others already reporting to him, a new director of sales, a head pro, and a director of operations will be reporting to him. Lionhead is in the process of filling these latter new positions.

- 9. Within the various departments there appear to have been a number of changes made in reporting structures. The superintendent, responsible for the greens operations, had an assistant, and maintenance and greens staff reporting to him. For the 1996 season the superintendent will also have responsibility for the marshals (people who are out on the golf course ensuring that the golfers are moving at a measured pace through the course and that back-ups are not forming). The marshals used to be the responsibility of the director of golf.
- 10. The food and beverage manager, in 1995, was responsible for the chef (to whom the sous chef and kitchen staff reported), the night manager, and two assistant food and beverage managers. In the 1996 season the food and beverage manager will also be responsible for the director of catering (who in turn will be responsible for the organization of tournaments, other catering, reservations, and card memberships). The night manager position appears to have been discontinued.
- 11. In 1995 the director of golf was responsible for the host pro, the assistant pros, the marshals, the pro shop, the cart maintenance person, valet services, lockers, servicing tournaments, and teaching. In 1996 a director of operations will be responsible for an operations manager (who will have control over valet services and the driving range), a pro shop manager (responsible also for the gift shop), and a maintenance manager (responsible for the carts and cleaning).
- 12. The accounting manager's responsibilities have remained unchanged. She is responsible for accounts receivable, accounts payable, and purchasing.
- 13. The head pro, with the assistance of assistant pros, will be responsible in 1996 for golf lessons, servicing tournaments, and public relations.
- 14. The director of sales will be responsible for marketing the services of Lionhead and the other two golf clubs owned by Kaneff.
- 15. Mr. Tseung's rationale for the sweeping changes is economic. The golf course division of Kaneff was not breaking even before Mr. Tseung's hiring. He was hired to turn the operations around and to attempt, at the least, to make the division break even. To that end Mr. Tseung's plans are geared to better marketing the three golf courses to ensure they increase their market share, to creating greater efficiencies within the golf clubs themselves, and to maximizing each department's income potential.
- As general manager Mr. Tseung created the 1996 budget himself. He allocated to each department what he believes its revenues and expenditures should be, and he cut budgets quite substantially. It appears these cuts were made without consultation with the department managers. A copy of the budget was given to each department manager, and each manager is responsible for implementing his/her own department budget.

- The hiring and termination of employees is delegated to the department managers, however, Mr. Tseung approves all such decisions. Without his authorization, no employee can be put on the payroll or taken off it. Mr. Tseung also authorizes any salary or hourly wage increases for employees. All management staff are on salaries, while the rest of the employees are paid hourly, as most are seasonal employees. Kaneff provides the golf clubs with a centralized payroll service as they do not have individual human resources departments. All employee records are maintained at the Kaneff head office. Department managers collect and total the hourly employees' time cards, initial each one, and submit the total of the hours worked to the receptionist. Mr. Tseung signs all payroll sheets before they go to the Kaneff head office for processing. Pay cheques are returned to Lionhead where they are put into envelopes and bundled by department. The department manager is given his/her respective cheques to distribute to the employees.
- 18. The hourly employees are paid at various rates of pay. They all receive any benefits required by statute, and are entitled to play golf in the off hours. There is no form of seniority for any purpose at Lionhead. If employees were acceptable the season before, they are recalled if they are interested in returning.
- 19. Invoices for the Lionhead operation are paid from the Lionhead accounting department. Department managers must authorize each expenditure, get a purchase order from the accounting department, check and initial the bill of lading or invoice when the purchase arrives, attach the purchase order, and then each invoice is authorized by Mr. Tseung for payment. Mr. Tseung has exclusive signing authority for the operation, so he signs all cheques for goods and services rendered to Lionhead. Since he draws up the budget, he also authorizes any capital expenditures and any significant purchase of a service or equipment for the golf club. Department managers cannot, of their own accord, make any major expenditure commitments.
- Mr. Paul Dodson gave evidence for the employer. He has been the superintendent of the grounds operation of Lionhead since March 1, 1995. As such, he is responsible for the golf course, the landscaping outside all of the buildings, and the parking lots. At the height of the 1995 season there were 43 employees in his department, but in the off season only Mr. Dodson and his department mechanic remain working. At the beginning of the 1995 season Mr. Dodson hired all his own staff. That hiring was done before Mr. Tseung began as the general manager in July, 1995, and there is no evidence to suggest Mr. Dodson would be able to hire employees on his own volition in the coming season, without first clearing the matter with Mr. Tseung. He has not had occasion to terminate any person's employment, but layoffs occurred at the end of the season from his department. Mr. Dodson did discipline his department employees with verbal reprimands. While Mr. Dodson indicated he could not hire or terminate the employment of persons from other departments, he did give an example of having verbally reprimanded two food and beverage cart workers for loitering and chatting on the golf course.
- The greens employees generally work from 5:30 a.m. to 2:30 p.m., with a skeleton staff on duty between 2 and 8 p.m., from the middle of May to August. Mr. Dodson schedules his department employees on a monthly calendar. He does so in consultation with the head pro so that he can arrange the schedule around tournament dates. His assistant also does a daily schedule to indicate the tasks to be completed. If the food and beverage department has a wedding booked, the greens department is informed so that flowers may be arranged and so that watering of the plants is done in order not to disrupt the wedding arrangements. Due to the seasonal nature of the work there is very little vacation scheduling to be done. Nonetheless, all time off must be authorized by Mr. Dodson or his assistant. In the event of illness or other emergencies, Mr. Dodson may accommodate the absence or ask another of his employees who has a day off to fill in.

- 22. In addition to maintaining the golf course, the greens staff maintain the planters on the terrace portion of the dining area. After tournaments they bring in chairs and tables which would have been set up by food and beverage staff on the greens. There are golf ball washers at various locations from which the greens staff collect dirty towels and deliver them to food and beverage staff for laundering. During the winter, the remaining greens staff do snow removal and assist food and beverage staff in putting up lights and Christmas decorations.
- 23. In September 1995, after the departure of the director of golf and when some of the restructuring began, Mr. Dodson became responsible for the eight marshals who maintain the flow of golfers on the course. The marshals, using walkie-talkies, also direct the four food and beverage cart operators to locations where golfers may want snacks or beverages.
- 24. In the course of his duties Mr. Dodson must coordinate with the manager of food and beverage services and the pro-shop. The coordination arises in particular when there are tournaments or weddings since the greens department is responsible for fertilizing and watering the golf course, ensuring that the golf course looks its best, and that a gazebo area and the terrace of the clubhouse have a good show of flowers. The management team, comprised of the general manager, the director of golf, the food and beverage manager, the chef, the head golf pro, the superintendent, and the accounting manager met for a weekly meeting at the start of the 1995 season. However, once the season was in full swing, meetings were only held on an "as needed" basis to coordinate the arrangements for a particular golf tournament or wedding.
- 25. There were some examples of shared resources between the departments. The food and beverage department buys soap and other cleaning supplies for itself and for the greens department. As needed, the greens department asks for such supplies. There is no allocation of these costs to the greens department budget from the food and beverage budget. If necessary, the greens department uses the ice machine in the food and beverage department to fill water coolers on the golf course. The food and beverage carts use the ice machine in the greens building to fill their carts with ice to keep the snacks and beverages cold. In 1995 the greens department gardener was asked to get quotes for the removal of all silk plants inside the clubhouse and their replacement with live plants.
- 26. The maintenance person, Mr. Joe Da Silva, who falls within the food and beverage manager's area of responsibility, also works for Mr. Dodson when he repairs irrigation pumps, turf maintenance equipment, and does some machining for the greens department using the greens department machine tools. Mr. Da Silva also repairs and maintains the golf carts, which are a responsibility of the head pro and are part of the pro shop operation. He works full-time year round.
- 27. The pro shop is the area to which golfers are brought by the valet service when they arrive at the club. Golfers register and pay here, and are then directed to the lockers where they can change. The locker area is cleaned, stocked, and staffed by two housepersons who are food and beverage department employees. Golfers who arrive very early in the morning are provided with a complimentary breakfast buffet. Hence, the pro shop informs the food and beverage department, the day before, how many persons may be expected for breakfast. Golfers are then assigned a golf cart in which they proceed out for their rounds of golf. The pro shop ensures that golfers are scheduled so that the maximum number of golfers may be out at any desired time. In the event of a tournament, the pro shop also needs to coordinate with the food and beverage department to ensure that the golfers arrive back at the clubhouse in a timely fashion so that they can attend at a planned luncheon or banquet. Returning golfers may use the locker room facilities where there are showers and towels provided, before proceeding to the lounge/bar area on the upper level. The

head pro and the five assistant pros give golf lessons which are arranged through the pro shop. For tournaments, the pro shop staff or the housepersons set up registration tables outside the pro shop so that a group can organize its own registration. After rain storms pro shop staff may be required to assist greens employees in draining water off the greens so that golfers can resume golfing as soon as possible.

- 28. The pro shop staff start work at between 5 and 6 a.m. normally, and earlier when there is a tournament. They work until the last golfer has finished playing. Some of the food and beverage staff, in particular the kitchen and serving staff, also begin to work early as golfers may be scheduled to arrive for breakfast. The food and beverage employees work until after dinner and banquets are over, usually until 10 or 11 p.m. Bartenders work until 1 a.m.
- The food and beverage operation of Lionhead is managed by Mr. Louis Fernandes, 29. who has been the food and beverage manager since October 13, 1995. Mr. Fernandes began employment at Lionhead as an assistant food and beverage manager one month earlier. He is responsible for the kitchen in the clubhouse, the Lion's Den (a small kitchen and snack bar at the ninth hole), the food and beverage carts which roam the golf course serving golfers while they are out on the course, the dining room and terrace, the bar, and the banquet rooms. In addition, he is responsible for the director of catering. Mr. Fernandes indicated the ballroom at the clubhouse can hold 400 persons, and there can be 288 persons golfing at any one time, so his staff can cater to the needs of all persons in the dining room and/or in the banquet facilities. The chef is allocated his own budget out of the food and beverage budget. Mr. Fernandes has hired staff, but only with the authorization of Mr. Tseung, the general manager. He has not had to terminate any person's employment, but would have to get authority to do so from Mr. Tseung. Mr. Fernandes has verbally disciplined employees for their performance. Scheduling is a responsibility of the food and beverage manager. He receives written requests for time off, and calls in persons to work if there are unforeseen absences of employees. The number of employees Mr. Fernandes schedules is premised on the number of golfers who will be at the Lionhead in any given week of the season, or in the off season, on the number of events to be held in the clubhouse.
- 30. While no evidence was led of the number of employees in the food and beverage department during the height of the golf season, in the middle of October 1995 there were approximately 55 persons still employed. It appears that during the height of the season students and others are hired to augment the more regular complement of food and beverage staff.
- The housepersons, under the authority of the food and beverage manager, do maintenance in the clubhouse and at the Lion's Den, serve at the Lion's Den, do the set up of tables and chairs on the greens during tournaments, clean all areas including the locker areas and all bathrooms, work in the receiving area taking in liquor, beer, linens, and all supplies, pick up flowers at the florist, and do the laundering of towels, tea towels, and table skirts. Housepersons, sometimes with the assistance of the pro shop staff, prepare signage for functions at the golf course. During the winter one or two of the housepersons work doing the cleaning and maintenance. They also clear snow off the front clubhouse steps and decorate the clubhouse with lights and Christmas decorations.
- 32. A food and beverage department employee books special events and tournaments. She works out with the client what time the tee off should be and when the banquet or luncheon should be arranged. The tee off times and the number of golfers is then turned over to the pro shop to log onto their scheduling computer. The tee off times are later passed on to the greens department so that its staff can be scheduled accordingly. During the winter the schedule of upcoming events is given to the greens department weekly so that Mr. Dodson can ensure snow clearing is done in

advance of any function. Of the food and beverage revenues, 85 per cent is derived from the golf tournaments and general golfing. The rest of the revenue comes from catering weddings, other special events, and Christmas parties. It appears that the revenues of the golf club are dependent on a coordination of the various services provided by the club.

- 33. The pro shop staff and the food and beverage staff work together to coordinate luncheon and banquet times. The pro shop informs the food and beverage department of whether the golfers are going to be on time or not, so that the kitchen knows whether to speed up or slow down its food preparation. The pro shop also keeps them informed of how many golfers are still out on the course so that the food and beverage department can determine how many of its staff may be sent home. If the Lion's Den is busy, the pro shop staff inform the kitchen so that more staff or food may be sent down to the Lion's Den. Food and beverage carts are hosed down and cleaned every day by the pro shop staff.
- All hourly employees working in the clubhouse or the Lion's Den punch in at the one employee entrance to the clubhouse. Their time cards are kept on one wall, although they are arranged by department. There are male and female staff locker rooms for the clubhouse employees. The greens department employees work out of a separate building where another punch clock is located for their exclusive use. There are a few examples of employees having transferred between departments. In April 1995 one food and beverage server asked, and was permitted, to work in the greens department. In the Fall of 1995 two pro shop staff asked to work in the food and beverage department and were permitted to do so.
- 35. Although all of the employer's witnesses gave evidence about the uniforms worn by the staff, we have preferred the evidence of Mr. Dodson as he appeared to have the most clear recollection of any of the three witnesses. The greens staff wear a blue grey t-shirt or sweatshirt, dark blue pants, and helmets. Their shirts bear an emblem of a lion and a weed eater. The food and beverage servers wear white shirts, black skirts or pants, and ties or bow ties. Those who work on the food and beverage carts, the housepersons, those who stage the golf carts and the Lion's Den staff wear dark blue pants tucked into red socks, and blue grey t-shirts and sweatshirts. Their shirts also bear an emblem, however no one could recall what it was. The pro shop employees wear golf shirts and sweatshirts of beige and blue grey colours, and pants tucked into socks, as do the other employees. The emblem on their shirts is a lion and a golf club. The kitchen staff wear white hats, white jackets, and chequered pants. All employees wear name identification badges.
- Mr. Tseung's concern about the applicant's proposed bargaining unit comprised of only the food and beverage workers is that it would divide what is a functionally integrated operation. If the food and beverage workers are granted a separate bargaining unit, the employer is concerned that the pro shop and the greens department could also end up being two additional separate bargaining units with a different union representing each. The resulting differing collective agreements and different terms and conditions of employment would be difficult for the employer to manage. In addition, since Mr. Tseung is presently implementing changes in the operation, there was concern expressed about how the employer would be able to make the changes it sees as necessary to become profitable if there are various groups of employees each covered by a separate collective agreement.
- 37. Diana Garvie, a food and beverage server, gave evidence on behalf of the union. She has worked at Lionhead since it opened five seasons ago. She indicated she had spoken to two persons from the pro shop when the union organizing drive was going on to ascertain whether there was any interest among pro shop employees in joining the union. One of the pro shop employees

said he would check with the others, and he later told Ms. Garvie that there was no interest in organizing. The greens staff also showed no inclination to participate in the organizing drive.

38. While Ms. Garvie gave evidence about what she perceived as the differences between the food and beverage staff and the pro shop and greens employees, her evidence was premised solely on her impressions. There was no basis established for her impressions, and we decline to rely on that portion of her testimony.

ARGUMENTS

- 39. The employer argued that the union is seeking a bargaining unit comprised of one department of an enterprise made up of between four and six departments. Relying on the evidence of how integrated some of the areas of work are at Lionhead, the employer argued it would be extremely difficult to both manage and restructure the golf club if one department was frozen into a bargaining unit while the rest of the operation was not. The food and beverage operation is not an island unto itself, having defined skills, its own clientele, and being operationally separate from the rest of Lionhead, but rather is only one part of the golf service provided by the club. The employer suggested there was no evidence before the Board of a separate and distinct community of interest between the food and beverage workers which set them apart from the other employees of the golf club. It was posited that there was nothing exceptional about this department for the Board to find a departmental bargaining unit to be appropriate in the circumstances of this case.
- 40. The employer suggested that the resulting fragmentation would cause serious labour relations problems for the employer, who may be faced with the prospect of having three or more bargaining agents to bargain with if each department could organize separately, could face more than one work stoppage if agreements cannot be reached, and may have to address jurisdictional disputes because of the mixed nature of some of the work performed by employees of different departments. There would be a reduction in flexibility, an immediate concern since restructuring is presently going on. The viability of a departmental bargaining unit was questioned since the food and beverage employees may be easily replaced during a strike, and since no other employees would be on strike, the golf club could continue to function. The employer argued there are compelling labour relations realities in this case which militate against the bargaining unit the union is seeking.
- 41. The union argued that the Board should find that the food and beverage staff have a sufficient community of interest, that their bargaining together would not cause undue fragmentation in the employer's labour relations, and that these workers would not otherwise be able to bargain collectively. The union stressed the Board does not need to consider whether the union is seeking *the* appropriate bargaining unit, but only whether it is seeking *an* appropriate bargaining unit which can be viable, and which will not result in serious labour relations problems for the employer. An added consideration is whether, if the Board does not find the bargaining unit appropriate, it would be denying that group of employees access to collective bargaining.
- 42. It was suggested by the applicant that fragmentation need not occur since the food and beverage employees could form one bargaining unit and the pro shop and greens employees could form another viable bargaining unit.

DECISION

43. In *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the Board had occasion to decide an issue regarding an appropriate bargaining unit in the hospital sector. Following a review of some of the pertinent jurisprudence, the Board stated as follows in paragraph 17:

17. ... While the requisites for effective collective bargaining cannot always be defined with certainty, may necessitate a balance of competing collective bargaining values, and may, in any event, turn on factors beyond the Board's control, the discretion to frame the "appropriate" bargaining unit during the initial organizing phase provides the Board with an opportunity (albeit perhaps a limited one) to avoid subsequent labour relations problems. Now, of course, this is not necessarily the same thing as minimizing administrative problems for the employer or organizing problems for the union. The structures and policies that promote a maximization of the employer's business interests are not those that will necessarily describe a viable bargaining unit, or the only viable bargaining unit - particularly since those interests may include a desire to avoid collective bargaining altogether, or limit its effectiveness. The employer's administrative structures are relevant in determining the bargaining unit, but they are not necessarily to be taken as the conclusive blue print in deciding what is appropriate. Nor is it a matter of simply giving an applicant union what it wants. It is, as we have noted, a matter of balancing competing considerations, including such factors as: whether the employees have a community of interest having regard to the nature of the work performed, the conditions of employment, and their skills; the employer's administrative structures; the geographic circumstances; the employees' functional coherence, or interdependence or interchange with other employees; the centralization of management authority; the economic advantages to the employer of one unit versus another; the source of work; the right of employees to a measure of self-determination; the degree of employee organization and whether a proposed unit would impede such organization; any likely adverse effects to the parties and the public that might flow from a proposed unit, or from fragmentation of employees into several units, and so on.

44. The Board went on to discuss the potential problems resulting from an unduly fragmented bargaining structure. At paragraph 20 the Board stated:

20. In Kidd Creek (and Stratford General Hospital, to a lesser extent), it was suggested that an inappropriate or unduly fragmented bargaining structure could contribute to subsequent labour-management problems, tension within and between bargaining units, and an escalation of industrial conflict. Such outcomes are undesirable. If these problems can be avoided by more careful attention to the determination of the bargaining unit "at the front end", without prejudicing other collective bargaining or statutory objectives, then that attention is obviously warranted. On the other hand, if the potential for collective bargaining difficulties is less obvious or serious, or if the possible problems are less certainly connected with one bargaining unit definition as opposed to another, or if similar problems are likely to arise wherever the line is drawn, then the precise perimeter of the bargaining unit may be less important from a policy point of view.

45. In paragraph 23 the Board expressed the question to be answered as being a relatively simple one:

[D]oes the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

Nine years after the above-noted case, *The Governing Council of the Salvation Army in Canada and Bermuda*, [1994] OLRB Rep. Jan. 85, issued. In that certification application the union was seeking one unit comprised of less than twenty four employees who worked at various locations of the employer. The employer argued it would be appropriate to have four separate bargaining units for these individuals. The Board found it made no collective bargaining or labour relations sense to subdivide the employees so as to create separate little islands of collective bargaining, each with its own collective agreement, seniority system, ability to strike, and so on. The tension between allowing bargaining structures which facilitate organizing, and bargaining structures which are more likely to be stable and effective in the long term, was recognized. The Board stated that there is no single "appropriate" bargaining unit, but rather degrees of appropriateness, and a trade union is not required to seek to represent the most comprehensive or appropriate unit. so long as the unit it seeks does not generate serious labour relations difficulties for the employer.

Notwithstanding the Board's apparent flexibility on this matter, the following comments were made with respect to the Board's concern about fragmentation:

- 21. If there is one theme that has been constant in the Board's concerns, both before and after *Hospital for Sick Children*, it is the aversion to fragmentation: the sub-division of an employer's enterprise into a number of separate collective bargaining components which become separate seniority districts, which can lead to jurisdiction or inter-employee rivalries, which can generate organizational problems if one or other fragment goes on strike, which can make work-sharing or technological change more difficult to accommodate, and so on. Accordingly, while smaller sub-divisions may be appropriate in the context of a particular case, and may be necessary to facilitate organizing (despite the collective bargaining "downside" described above), a broader, more comprehensive unit will *also* generally be appropriate. ...
- Our review of the cases provided to us by the union indicates that in all except two of those cases the Board was addressing a certification application for one or more locations of a multi-location employer. In the case before us it is not a question of the employer having more than one location, but rather whether it is appropriate to carve out one department of an enterprise where all of the employees of that enterprise work at one location. The union relied on *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371, to argue that the Board has recognized there must be a balance struck between allowing workers access to collective bargaining, and an interest in more comprehensive bargaining units which may be more viable in the long term.
- In the *Board of Governors of Ryerson* case the union had applied to represent a bargaining unit composed of employees engaged in office, clerical and technical work, and those working in food services. The employer argued these employees should be separated into three bargaining units. The Board accepted the union's proposed bargaining unit as an appropriate one and declined to create a separate unit for a department. It reiterated the policy considerations which favour reducing fragmentation, and in particular noted that a proliferation of bargaining units increases the risk of work stoppages, creates enclaves which impede the mobility of employees, and spawns jurisdictional disputes. A fragmented bargaining structure requires an employer to expend time and trouble negotiating and administering several collective agreements, an unnecessary duplication of effort. At paragraph 20 the Board noted that "bargaining units consisting of employees in one particular classification or department are not generally considered by the Board to be appropriate because such small units entail excessive fragmentation".
- The responding party relied on a number of cases to support the proposition that the Board should not carve out one department and find it to be an appropriate bargaining unit. In Westeel-Rosco Company Limited, [1979] OLRB Rep. Nov. 1125, the union was seeking to represent the employees of the Printing and Advertising department of a location which housed 14 departments of that employer. The Board did not find the applicant's proposed bargaining unit to be appropriate, and in the course of the decision noted that it was only in exceptional circumstances that the Board had found a separate department to be an appropriate bargaining unit. In those cases the Board had been satisfied that the department in question was a separate and distinct group, functioning as an independent entity. The factors the Board considered were the functional independence of the entity, its geographic separation, employees' authority to deal directly with the customers, differences in working hours, absence of evidence of interchange, preparation and administration of a separate budget, and ultimate authority to hire, promote, transfer, and discharge employees within that entity. (See also Ex-Cello-O-Corporation of Canada Limited, [1974] OLRB Rep. Aug. 543, and The Governors of the University of Toronto, [1969] OLRB Rep. Feb. 1149).
- 50. Even in the retail sector, where the Board has found single location units to be appro-

priate, the Board has reiterated its view that dividing an enterprise into departmental bargaining units would not be conducive to orderly collective bargaining, notwithstanding that the department may be a specialized one (see *T. Eaton's Company Limited*, [1984] OLRB Rep. May 755 and *Simpson's Limited*, [1984] OLRB Rep. Sept. 1255).

More recently, in *Sifton Properties Limited*, [1993] OLRB Rep. Oct. 1010, the Board accepted that the consequences of fragmentation are not "idle speculation", but are a problem which has been recognized in Ontario as well as in other Canadian jurisdictions. The Board noted that it may not have the power to later consolidate or rationalize the bargaining structure, so it should be particularly careful in fashioning the bargaining unit in the first place. At paragraph 29 of that decision the Board went on to state:

The Board has departed from that approach on the agreement of the parties and in particular situations of historical anomaly, or in light of the history of a particular sector, acceding to requests for classification-specific bargaining units in some cases. As well, where the applicant has been able to show difficulties with access to bargaining, particularly in situations where the respondent was in effect asking the union to organize more than one work site, the Board has balanced the interests of the parties, given particular weight to the organizing interests of the employees and certified unusual bargaining units. However, it has never done so lightly, or without a particular reason to do so.

- 52. Sifton Properties Limited was cited with approval in Pepsi Cola Canada Ltd., [1995] OLRB Rep. Aug. 1131. In that case the union was seeking to represent drivers and drivers' helpers, but wished to have warehouse personnel excluded. The employer objected, and the Board ultimately found that the union's proposed bargaining unit was not appropriate. The Board noted that:
 - 54. It also seems clear that the issues respecting fragmentation will be different where the bargaining unit proposed carves out a portion of the employees at a single workplace, than where there are a number of locations operated by a single employer. Indeed, many of the Board's recent decisions on bargaining unit configuration, including some of those cited by the parties, have been concerned with the organization of single locations of multiple location retailers. In these circumstances, where the locations are reasonably autonomous of each other, and having regard to the issues around impediments to organizing where there [is] more than one workplace, and in the retail sector generally, the Board has been more inclined to tolerate a certain degree of fragmentation in order to facilitate access to collective bargaining.
- 53. The parties drew the Board's attention to some Board decisions relating to certification applications for bargaining units at golf courses. In *Beach Grove Golf and Country Club Limited*, [1967] OLRB Rep. July 357, a trade union was seeking to represent those workers employed in the maintenance of a golf course. The employer proposed an all employee unit. The Board found it would not be appropriate to have an inside and an outside unit in the absence of any evidence of a history establishing that the two groups had been divided in such a way by the employer, and in the absence of evidence of craft status for either group. While the Board recognized that maintenance staff performed different duties under different working conditions from those who worked inside the golf club, it did not accept that these differences alone constituted separate communities of interest.
- The union relied heavily on Fort William Golf & Country Club Limited, [1995] OLRB Rep. Aug. 1070, a recent decision in which a panel of the Board found that a bargaining unit comprised of grounds staff at a golf club was an appropriate bargaining unit. In that case the effect of pro shop was not a factor required to be considered by the Board, however, the clubhouse staff were relevant to the Board's consideration. The union was seeking to represent only the grounds staff and the employer contended that an "all employee" unit comprised of the grounds and club-

house staff would be more appropriate. The Board found the golf course operation and the clubhouse operation to have two distinct lines of managerial authority within the club, reporting to the Board of Directors; the grounds staff had little to do with the clubhouse; the grounds employees wore different uniforms; the grounds operation had its own budget, set its own wage rates, and had different work hours from the clubhouse staff; there had been no transfer of employees between the grounds and clubhouse staff in the past decade; and, although the Board found there was cooperation between the pro shop, the clubhouse and the grounds staff, it was found that the grounds staff worked separately. The Board found there was a community of interest between the grounds employees and that they had signified their wish to bargain collectively as a distinctive group. No concern for fragmentation was expressed because the Board held the grounds staff were already treated as a separate and distinct working unit.

- 55. The facts in *Fort William Golf & County Club* are distinguishable from the facts of the case before us. In *Fort William* the Board concluded that the differences between the two groups of employees went to the root of the organization and that there was a *de facto* division between the grounds and hospitality staff. On the evidence before us, we are satisfied that Lionhead is an integrated enterprise. Part of its services is the provision of food and beverages both on and off the golf course. The food and beverage operation is dependent on the golfers and tournaments, which are the bulk of the business of the club. It is not only financially that the services are interdependent, it is also functionally integrated. Hence, there is the coordination of golfing schedules, food preparation and greens maintenance schedules to ensure a smooth operation.
- The food and beverage operation is akin to a department of the Lionhead Golf and Country Club. The budget for the food and beverage operation is set by the general manager of the club, who also appears to decide *all* significant financial matters for every aspect of the golf club and who maintains ultimate control over hiring and termination of employees. In the last year there were three examples of employees of one department requesting to transfer to another, and those transfers were effected, suggesting there have been no barriers erected between the various departments of the golf club. As the facts outlined above indicate, there is regular contact between a number of the food and beverage employees and the grounds and pro shop staff. The lines dividing work of the various groups are blurred: for example, pro shop staff, greens employees, and the housepersons all move tables and chairs in and out of the clubhouse; the greens employees and housepersons both do laundry and make signs; the food and beverage cart operators take direction from the marshals; and the maintenance person works for the greens department, the pro shop, and the food and beverage department.
- 57. Our review of the Board's jurisprudence indicates a generally circumspect attitude towards departmental carve-out units, and a deep concern for the fragmentation which may result if departmental units are found to be appropriate. The majority is of the view that there is potential here for at least three bargaining units, which could be represented by three or more different bargaining agents, just the type of proliferation of units which would cause serious labour relations problems for the employer.
- The union asked the Board to consider that the employees of its proposed bargaining unit would not have access to collective bargaining if the bargaining unit the union seeks is not accepted. The union's evidence indicated employees of the pro shop and the greens department had shown no interest in the organizing drive. While access to bargaining is an important consideration for the Board in light of its mandate under the Act, the Board has historically also weighed other factors along with this consideration. Where there is apparent difficulty in organizing a particular sector, the Board has accepted as appropriate bargaining units which would not otherwise

be found so. The Board has indicated it is concerned about access to bargaining in the banking and retail sectors, and has found single location units to be appropriate because of the recognition that it may be difficult for a union to organize all retail outlets or bank branches in a particular locale. However, as the *T. Eaton's* and *Simpson's* cases (cited above) indicate, even in the retail sector the Board has declined to grant carved out units for some departments and not others. In the case before us, there is no evidence or history of organizing difficulties in this type of workplace, nor can we draw an inference to that effect.

- 59. Having regard to the considerations outlined above, and after reviewing the facts of this case, the majority was of the view that the union's proposed bargaining unit is not appropriate.
- 60. Following the release of our decision of March 5, 1996, the applicant advised the Board that it wished to withdraw this application for certification. Pursuant to section 7(10) of the Act, this application is hereby withdrawn with leave of the Board. The Board will not consider another application for certification by the applicant as the bargaining agent of the employees in the bargaining unit until one year elapses from the date of this decision.

DECISION OF BOARD MEMBER H. PEACOCK; April 10, 1996

- 1. I dissent.
- 2. In the hospitality and retail industries in particular, with their multi-location, multi-departmental structures, the Board is frequently confronted with the difficult task of balancing employees' interest and access to collective bargaining against the need to avoid the perils of fragmentation. The viability of the bargaining unit applied for must rest on a degree of cohesion, stability and negotiating capacity displayed both by the employee group and its bargaining agent.
- 3. In this case, looking at all the circumstances of the work and structures at Lionhead considered by my colleagues, I would give more weight to the predictive factors of success of the proposed unit over the labour relations difficulties posed by such a unit. The food and beverage operation of Lionhead Golf and Country Club is the largest and most cohesive group of employees of any of the club operations. It is also the group with the largest core of employees who return year after year, and who are employed for a longer season compared with those at work outside the club house.
- 4. If there is one group of employees which on its own is likely to sustain a new regime of collective bargaining, it is the food and beverage operation. Moreover, the Board's historical concerns over the inability of "stand alone" units to achieve a first collective agreement must be tempered by the experience of the first contract arbitration provisions of the Act which in essence survived the Bill 7 amendments of 1995. These provisions have enhanced the likelihood of a second and subsequent collective agreements and demonstrates to as yet unorganized groups with the same employer the benefits of collective bargaining.
- 5. For these reasons, I find the bargaining unit proposed by the applicant trade union to be appropriate and would grant the certificate.

4101-95-U The Crown in Right of Ontario, as represented by Management Board of Cabinet, Applicant v. The Ontario Public Service Employees Union, Responding Party

Crown Employees Collective Bargaining Act - Essential Services Agreement - Management Board applying under Crown Employees Collective Bargaining Act to vary essential services order made 10 months earlier - Earlier order declaring that essential service work for meat inspectors during strike or lockout in OPSEU bargaining unit limited to monitoring meat processing operations to ensure that no illegal slaughter occurring - Management Board seeking order permitting limited inspection of meat processing operations or, alternatively, amendment to essential services agreement providing for more inspectors to monitor operations if slaughtering not to occur - Board declining to vary its earlier order or to amend essential services agreement, but parties directed to negotiate emergency services protocol of meat inspectors

BEFORE: Laura Trachuck, Vice-Chair

DECISION OF THE BOARD; March 14, 1996

1. This is an application under sections 36(4) and 38(2) of the *Crown Employees Collective Bargaining Act* (CECBA). The application was heard on an expedited basis on March 11, 12 and 13, 1996. The applicant requests that the Board vary its order dated May 10, 1995 in which it declared that essential service work for meat inspectors during a strike or lockout would be limited to monitoring meat processing operations to ensure that no illegal slaughter occurred. The applicant seeks an order that would permit limited inspection of meat processing operations. The applicant is requesting, in the alternative, that the Board amend the essential services agreement negotiated by the parties to provide for more inspectors to monitor the operations if slaughtering is not to occur. In the second alternative the applicant asks the Board to confirm the practice of using "emergency workers" that it instituted on March 5.

Facts

- 2. Although the detail contained in this decision will be limited due to the expedited nature of these proceedings it is necessary to set out some of the background facts which were disclosed through the evidence.
- 3. The province regulates 290 meat slaughtering operations. These are generally small to medium size operations which are responsible for 15% to 20% of the meat processed in the province. Most of the meat processed through these plants is poultry or lamb as well as some "exotic" meats such as pigeons, rabbits or wild boar. The rest of the meat in the province is processed in federally regulated plants which are generally larger. The Meat Industry Inspection Branch of the Ministry of Agriculture, Food and Rural Affairs is responsible for enforcing the governing legislation of this industry which is the *Meat Inspection Act (Ontario)*. The Meat Inspection Act provides, among other things, that the slaughter of any animal which has not been inspected by an inspector is prohibited and that no one shall operate a slaughtering plant without a license.
- 4. The parties commenced negotiations for the essential services agreements required by CECBA in the autumn of 1994. As part of this process the parties participated in a consultation before the Labour Relations Board with respect to essential services by meat inspectors in May 1995. The Director of the Branch testified that he participated in some of the essential services negotiations and clearly expressed the view that if no inspection service was offered there would be a risk that some of the meat processing plants would engage in illegal slaughter. As a result of the

consultation process the Board ordered that no inspection services would be provided during a strike or lockout. As no inspection services would be offered the provincially regulated slaughtering operations would be closed down. The Board did however declare that "the Meat Industry Inspection Service" is an "essential service" and directed that 26 meat inspectors be designated essential to monitor sites to ensure that no illegal slaughter was occurring. There are 13 areas in the meat inspection programme and two essential service workers would be assigned to each area to work in teams for their health and safety. 16 of the essential workers would be from the bargaining unit and 10 were management "offsets". Subsequently the parties negotiated and entered a number of essential services agreements including one in June, 1995 which confirmed the content of the Board's order.

- 5. The Ministry made a conscious decision not to inform the operators of the content of the essential services agreement until February 19, 1996, after the bargaining unit had voted in favour of a strike. On that date the operators were advised by letter that no meat inspection services would be provided in the event of a strike. Attached to that letter was a list of questions and answers. One of the questions and answers described the fines under the *Meat Inspection Act* which are \$2,000.00 for a first offence or imprisonment up to 6 months, and \$5,000.00 for a second offence and imprisonment up to one year. The next question on the page was "Will illegal slaughter infractions be dealt with as a licensing issue?" and the answer was "No. It will lead to prosecution in court". The Director testified that the Ministry decided not to inform the operators of the potential effect of a strike before February 19 because it did not want to harm their business unnecessarily if a strike did not occur. The Director also explained that he advised the operators that they might be subject to prosecution if they slaughtered illegally but that it would not affect their licenses because he did not think they should be subject to two penalties for the same offence. One of the operators sought an injunction with respect to the Board's order and was unsuccessful.
- 6. The bargaining unit which includes the meat inspectors went on strike on February 26, 1996. The essential service inspectors were instructed to visit all of the plants and obtain or secure the Ministry's stamps and tags which are used to identify meat which has been inspected. Nine stamps have not been secured from plants which continue to refuse the inspectors entry. No charges have been laid as a result of this obstruction of the inspectors and no licenses were revoked. Surveillance was conducted on these operations and as no suspicious activity was detected surveillance has been removed. Since the strike began, the meat inspection programme Manager and the Director have received reports of suspicions of illegal slaughter on a number of occasions. These reports have been investigated and six are the subject of further investigation with a view to the possibility of laying charges. The Board heard evidence of only one incident of allegedly uninspected meat being found in a retail establishment and that was within two days of the commencement of the strike before the stamps were secured.
- The meat inspectors are responsible for inspecting the plants and slaughtering operations but they are not responsible for visiting retail establishments or wholesalers to ensure that meat has been inspected. That is the function of inspectors in the regional health units. There was no evidence presented to the Board that the health unit inspectors have found any uninspected meat entering retail establishments except the one incident referred to above to which they were directed by the meat inspectors. Investigation of any suspected illegal activity is the responsibility of 8 investigators, not the meat inspectors, although the meat inspectors provide some initial assistance. The investigators can be called in as needed according to an emergency services protocol negotiated by the parties. The meat inspectors however have the authority to detain meat and will participate in its seizure if necessary.
- 8. On March 5 the meat inspection programme Manager and the Director of the Branch

were of the view that they had an insufficient number of essential service workers monitoring the plants due to the number which were involved in surveillance and investigation of suspected illegal activity. They therefore called in 13 more teams on the basis that there was an emergency. By March 11 only three "emergency" teams were still being used. The parties had not negotiated an emergency services protocol with respect to the meat inspectors.

The owner of one of the plants who also claimed to represent an association of independent poultry producers testified in this hearing. He explained that his business involved negotiating with poultry growers approximately every 10 weeks to buy their chickens which he would then slaughter, package and market. The growers are subject to a marketing board which will penalize them if they produce too much volume, that is, if their chickens get too big. It is therefore incumbent upon the operator to take delivery of the chickens at the time he has undertaken to do so. The witness had arranged to have his chickens slaughtered at a federal plant but he explained that he was losing money by doing so. He also processes rabbits which he has arranged to have slaughtered at a federal plant by his own employees as the federal plant did not have the expertise. The witness described the financial hardship he and his colleagues are experiencing and their concern that they are losing customers. He explained that if he was provided with partial inspection service as proposed by the applicant, he could supplement it by coordinating with other operators who would also be receiving service and by continuing to use the federal plants. In this way he believed he could carry on his business during the strike.

Decision

The applicant's request to vary the Board's order of May 10, 1995

- 10. The applicant is asking the Board to reconsider and modify its order of May 10, 1995 in view of what it alleges are "changes in circumstances". The applicant is asking the Board to order that 70 bargaining unit members be declared essential to provide for limited inspection of meat processing operations. This would have the effect of allowing the slaughtering operations at provincially licensed premises which have been shut down by the strike to reopen.
- The responding party denies that there has been a change in circumstances and resists any variance of the Board's order. It argues that there is no danger to life, health or safety but if there is, that the Ministry must use the tools it has at its disposal to procure the safety of the public before this order should varied. It suggests that charges should be laid against non-compliant operators and licenses should be revoked as those penalties would send a clear message to the operators of the serious consequences of their actions.
- The Board finds that there has not been a change in circumstances and denies the request to vary its order of May 10, 1995. The applicant claims that there are three changes in circumstances: the level of coverage has significant gaps; there is evidence of illegal activity; and there is economic pressure on the operators which may motivate them to engage in illegal activity. The Board does not find that the evidence disclosed that there were significant gaps in coverage by the essential service workers and will refer to that allegation in more detail in the following section. It is not a change in circumstances that illegal activity has been detected. The likelihood of such activity was known to the parties at the time of the consultation and negotiation of the agreement and is obviously the reason for ordering monitoring as an essential service in the first place. The economic hardship being experienced by the operators and its potential impact must also have been within the parties contemplation at the time of the consultation and negotiation of the agreement. I note that this hardship might have been mitigated somewhat if the operators had had more notice that they would be closed down in the event of a strike and could therefore have considered that in entering contracts for the purchase of animals which would be ready for slaughter during

the strike period. They would also have had more time to make arrangements for slaughter in federal facilities.

13. The purpose of an essential service agreement or a Board order with respect to such an agreement is to provide services "necessary to enable the employer to prevent danger to life health and safety". There is no evidence that the Board's order is preventing the employer from providing such service. The applicant argues that providing 25% of its usual inspection service would take enough pressure off the operators to ensure that they will not be tempted to operate illegally. The applicant's proposal is based on little more than a theory. There is no evidence or particular reason to believe that an operator which would be prepared to slaughter illegally because it is getting no inspection service would not do so if it is getting some service but not enough to meet its financial needs. It is not appropriate to vary a Board order arrived after consultation with the parties on the strength a gamble based on the Ministry's best guess about human nature.

The applicant's request to amend the essential services agreement

- 14. The applicant is requesting under s.38(2) of CECBA that the Board amend the essential services agreement to provide for 34 more essential service teams to monitor for illegal activity. The applicant claims that the present number is insufficient to "enable the employer to prevent danger to life, health and safety". The applicant also requests that the agreement be amended to provide that all of the original 26 essential service workers be from the bargaining unit thereby releasing the 10 management offsets. The applicant argues that that result is dictated by s.38(4) of CECBA any time the Board amends an essential services agreement. The effect of granting the applicant's request would be that 50% of the bargaining unit inspectors would be working during the strike.
- 15. The responding party opposes the amendment of the agreement and argues that more designated essential workers are not necessary. It argues that there is no evidence of a danger to life, health and safety and that the Ministry should use the prosecution and licensing tools at its disposal to discourage operators from committing illegal slaughter before the complement should be increased.
- The Board denies the applicant's request to amend the essential services agreement. There was no evidence presented to the Board which indicated that there had been any difficulties in coverage which would require a permanent accretion to the essential services complement. Any problems which the applicant has identified were of a temporary nature arising from the fact that the monitoring by the designated complement was working, that is, they were detecting potentially illegal activity. The Board notes that there was no evidence that any steps were taken by this Ministry or any other to alert retailers or wholesalers to be particularly vigilant to ensure that any meat received, sold or purchased has been stamped as inspected. If there was a very real concern by the Ministry about the public's health and safety that would have been an obvious step to take.

The applicant's request to continue using bargaining unit meat inspectors as emergency workers

There was no emergency service agreement negotiated between the parties and the responding party argued that the applicant was not entitled to call in the "emergency teams" as it did. The responding party has not however, filed an application of its own and is not requesting that the Board take any action with respect to the applicant's invocation of emergency procedures. It is therefore unnecessary for the Board to determine whether the applicant violated either the essential services agreement or CECBA by its conduct. It does appear however, that there is a problem in providing the essential monitoring service described in the Board's order in some circumstances where the essential service team is required to spend time in an investigation. The

Board's order of May 10, 1995 indicates that, as well as monitoring, the essential service workers are to "provide the necessary activities through the appropriate channels of the Branch" when violations are detected. If those activities do require an inspector or a team to spend a significant period of time at one plant either because they have good reason to believe that an illegal slaughter might occur or they have to investigate something that has already occurred, it is appropriate that another team or inspector be called in to ensure that the rest of the essential service, i.e. the monitoring, is being carried out.

- The investigators are subject to an emergency services agreement and it is appropriate to consider a suspected illegal slaughter as an emergency. It is of course vital that any meat that has been slaughtered illegally be detained and potentially that it be seized. Those are functions exercised by the meat inspectors. The inspectors may also be involved in other aspects of an investigation since they are familiar with the plants and are likely the individuals who identified the suspicious circumstances in the first place. The Board therefore directs the parties to meet and negotiate an emergency services agreement prior to 5:00 p.m. Tuesday, March 19. Since the investigation of potential illegal activity and the detention of product is the "emergency" it is probably consistent with the essential services agreement that the emergency workers be brought in to perform that function. However, it may make more sense for the workers who have identified the situation to remain involved. That is an issue for the parties to work out. The agreement should also identify a threshold number of hours that an essential worker would have to be involved in an investigation for an emergency worker to be called in as it is only contemplated that emergency workers will be used when other activities are consuming sufficient time that a designated essential worker is unable to perform his or her monitoring duties.
- 20. The Board therefore makes the following order:
 - a) the parties are directed to negotiate an emergency services protocol of the meat inspector consistent with Part C of the Conditions for 1994/1995 OPS-OPSEU Essential Services and Collective Agreement by 5:00 p.m. Tuesday March 19.
 - b) the agreement must identify the designated emergency workers and the order in which they are to be called in
 - c) the agreement must specify the threshold amount of time an essential services inspector would be required to divert form the monitoring function before it is considered necessary for an emergency worker to be called in
- 21. The applicant may continue to deploy emergency workers as it has been doing until the parties enter the emergency services agreement specified above. The Board will remain seized with respect to any matters arising from this award. At the request of the parties the Board will also remain seized with respect to any further matters related to this dispute.

3279-95-R; **3699-95-U** Local Union 47 Sheet Metal Workers' International Association, Applicant v. **Maverick Mechanical Contractors Limited**, Responding Party; Sheet Metal Workers' International Association, Local 47, Applicant v. Maverick Mechanical Contractors Limited, Responding Party

Certification - Certification Where Act Contravened - Interference in Trade Unions - Intimidation and Coercion - Remedies - Unfair Labour Practice - After receiving copy of union's certification application, employer meeting with employees one-to-one and asking them to sign personalized declaration opposing trade union - Employer acting on legal advice and in belief that he was acting in compliance with Board's rules - Only one of five employees subsequently casting ballot in representation vote - Union losing vote - Board setting aside representation vote and directing new vote - Employer directed to cease and desist violating Act, to post decision and attached notice in workplace and to mail copy to each employee at home, and to provide union opportunity to address employees at meeting held during normal working hours - Union's application to be certified under section 11(1) of the Act dismissed

BEFORE: D. L. Gee, Vice-Chair.

APPEARANCES: J. Raso and Paul Graveline for the applicant; Michael S. Ruddy and Neil Robertson for the responding party.

DECISION OF THE BOARD; April 16, 1996

- 1. Board File No. 3279-95-R is an application for certification which was filed with the Board on November 30, 1995. Board File No. 3699-95-U is an application under section 96 of the *Labour Relations Act, 1995* (the "Act") filed on January 10, 1996 in which the applicant seeks certification pursuant to section 11 of the Act.
- 2. The facts relevant to the Board's determination are not largely in dispute.
- 3. Maverick Mechanical Contractors Limited ("Maverick") is a mechanical contractor specializing in ventilation sheet metal work in the ICI sector of the construction industry. Neil Robertson is the sole owner, director and shareholder of Maverick. He is responsible for all of the company's estimating, tendering, purchasing and accounting.
- 4. Maverick began work at the Loeb Medical Research Institute, Ottawa Civic Hospital (the "Loeb job site") in October, 1995. At all times material to these applications, the Loeb job site was Maverick's only significant active job. Maverick employed five sheet metal workers on the Loeb job site: John Grant, Roger Goodenough, Grant Doran, Rick Jones, and Shaun Rancourt. All five are expected to continue working at the Loeb job site until its completion which is slated for June, 1996.
- 5. Mr. Robertson testified that he believed that John Grant and Grant Doran are members of the applicant because, prior to commencing employment with Maverick, they were employed by his father's unionized company. Mr. Robertson has been told that Rick Jones is a member of the applicant. Thus, at least two, and possibly three, of the five employees at work in the bargaining unit on the application date have been members of the applicant for some time and have had experience working in a unionized environment.
- 6. The application for certification was filed with the Board on November 30, 1995. The applicant seeks to represent all journeymen sheet metal workers and registered sheet metal

apprentices employed by Maverick in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen sheet metal workers and registered sheet metal apprentices employed by Maverick in all other sectors in Board Area 15, save and except non-working foremen and persons above the rank of non-working foreman. The applicant filed membership support on behalf of three individuals who were at work in the bargaining unit on the application date. The effect of the applicant being certified for the unit sought would be that Maverick would immediately become bound to the applicant's Provincial ICI agreement. Maverick and the applicant would negotiate agreements applicable to non-ICI work.

- 7. Pursuant to the Board's Interim Certification and Termination Rules, the application, a response form, a copy of the Board's Interim Certification and Termination Rules and a copy of Information Bulletin #2(C) Vote Arrangements, were all served on Maverick on Friday, December 1, 1995.
- 8. Mr. Robertson faxed a copy of the materials served on him to a lawyer (not the lawyer who represented Maverick at the hearing) and was advised that the forms were straightforward and that he should complete them himself.
- 9. Mr. Robertson raised Rule 43aa of the Board's Interim Certification and Termination Rules with the lawyer. Rule 43aa provides as follows:

43aa Evidence that employees do not wish to be represented by a trade union will not be considered by the Board unless the evidence accompanies the application, is in writing and signed by each employee concerned, and is accompanied by the name of the employer and the name, address, telephone number and facsimile number, if any, of a contact person for the applicant. Evidence that employees do not wish to be represented by a trade union must also disclose the date upon which each signature was obtained.

- 10. Mr. Robertson thought Rule 43aa was applicable to his situation and that it meant that, if he presented the Board with evidence that his employees did not want a union, a vote would not be necessary. The lawyer advised him that obtaining signed declarations from his employees was a good idea. As a result of such discussion, as well as a conversation Mr. Robertson had with a Board Officer, he decided that he would obtain signed declarations from his employees.
- 11. Mr. Robertson completed the response form and faxed it to the Board and to the applicant on December 5, 1995. In response to the question "[d]o you wish to make any other representations with respect to this application?", posed at paragraph 18 of the response form, Mr. Robertson wrote as follows:

We have additional evidence to supply herewith. Because of the shortage of time we will present that evidence by end of business December 6/95.

The "additional evidence" Mr. Robertson referred to was the declarations he intended to seek from his employees. 12. Mr. Robertson prepared declarations for each of the five employees working on the Loeb job site to sign. Each declaration was individualized such that it had the employee's name typed in and indicated whether the individual was a sheet metal apprentice or a sheet metal worker. The declarations read as follows:

DECLARATION

Sheet Metal worker] by Maverick Mechanical Contractors Limited at the Loeb Medical Research Institute, Ottawa Civic Hospital.

I further declare that it is my intention while employed by Maverick Mechanical Contractors Limited that I do not wish to be represented or governed by Local 47 or any other Union or Association.

Signature
 Date

The declarations are printed on Maverick letterhead.

- On December 6, 1995 at approximately 2:00 p.m., Mr. Robertson attended at the Loeb job site. All five employees were at work on the site that day. Mr. Robertson approached Messrs. Goodenough, Doran, Jones and Grant individually and asked them to read the declaration and, if they agreed with it, to sign it. Each individual read the declaration and signed it. Mr. Robertson's discussion with each individual was extremely brief. Mr. Robertson could not find Mr. Rancourt and after a brief search left the job site without having approached him.
- 14. Upon arriving back at his office at approximately 4:00 p.m., Mr. Robertson discovered that he had received a fax from the Board indicating that a vote would be held on December 8, 1995 at 11:00 a.m. at the Loeb job site. Although Mr. Robertson did not previously know the exact date on which the vote would be held, he was aware that the vote would be held within five days of his having received the application.
- 15. Mr. Robertson believed the declarations he had had signed by the employees would render the vote unnecessary. He faxed them to the Board on December 6, 1995 at approximately 5:00 p.m.
- 16. On the morning of December 7, 1995, Mr. Robertson spoke to Mr. Grant on the phone and advised him that there would be a vote the following day. Mr. Robertson attended at the job site at approximately noon on December 7, 1995 and posted the Board's decision directing the vote as well as the Notice of Vote in Maverick's lunch room. Mr. Robertson advised Mr. Grant of the posting and the fact that there was to be a vote.
- 17. Maverick's standard work week is nine hours per day Monday to Thursday. Work is only performed on Fridays to correct deficiencies or if a job is running behind schedule. On December 6, 1995, Maverick received notice of a deficiency on the Loeb job site. Mr. Robertson asked Mr. Grant if he and Mr. Rancourt wanted to work. On Friday, December 8, 1995, the only individuals at work were Messrs. Grant and Rancourt.
- 18. On December 8, 1995, Mr. Robertson arrived at the job site at 10:45 a.m. The vote was delayed and accordingly Mr. Robertson took a walk to look for Messrs. Grant and Rancourt. Mr. Robertson saw Mr. Rancourt working. Mr. Robertson never saw Mr. Grant. The vote was eventually conducted at 12:00 noon. Mr. Rancourt was the only individual to vote. Mr. Rancourt cast his ballot in opposition to the union.
- 19. Maverick submits that the applications should be dismissed or, in the alternative, that the Board should order the holding of another vote. In Maverick's submission, while Mr. Robertson's conduct was ill-advised, it was not tainted by anti-union motivation. It is submitted that Mr. Robertson was motivated by a desire to see the application concluded without the need for a vote.

It is further submitted that, while the employees may have been placed in an uncomfortable position when approached by Mr. Robertson and asked to sign the declaration, Mr. Robertson's conduct did not interfere with the employees' right to attend on December 8, 1995 and cast a secret ballot.

- The applicant disputes that Mr. Robertson acted without an anti-union motive. It is asserted that Mr. Robertson's actions were designed to avoid the union being certified. In the applicant's submission, Mr. Robertson's conduct violates sections 70, 72(c) and 76 of the Act. The applicant also disputes the suggestion that Mr. Robertson's conduct did not affect the employees' ability to attend on December 8, 1995 and cast a secret ballot expressing their true wishes. The applicant relies on the following facts: Mr. Robertson is the sole owner of Maverick; he met with the employees one-on-one and face-to-face when he asked them to sign the declaration; the bargaining unit is very small; the declarations were signed only two days before the vote; and the union's support dwindled from 60 percent, when the application was filed, to zero, within a period of one week. The applicant asks the Board to conclude that the vote taken on December 8, 1995 does not reflect the employees' true wishes and that another representation vote would not be sufficient to counter the effects of the violations of the Act committed by Maverick.
- 21. Section 11(1) of the Act provides as follows:

11.(1) Upon the application of a trade union, the Board may certify the trade union as the bargaining agent for the employees in a bargaining unit in the following circumstances:

- 1. An employer, employers' organization or person acting on behalf of an employer or employers' organization has contravened the Act.
- The result of the contravention is that a representation vote does not or would not likely reflect the true wishes of the employees in the bargaining unit about being represented by the trade union.
- No other remedy, including the taking of another representation vote, is sufficient to counter the effects of the contravention.
- 4. The trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board to be appropriate for collective bargaining.
- 22. The language of the section makes clear that certification under section 11 can only be granted if the following conditions are met:
 - 1. The Act has been violated.
 - 2. As a result, a representation vote does not or would not reflect the employees' true wishes concerning union representation.
 - 3. No remedy, including the taking of another representation vote, would counter the effects of the violation.
 - 4. The union has membership support adequate for the purposes of collective bargaining.
- 23. In the present case, Mr. Robertson met with his employees one-on-one and asked them to sign a personalized declaration opposing the trade union. The Board's jurisprudence clearly

indicates that an employer has no place engaging employees in one-on-one discussions concerning a trade union in circumstances where such discussions would reveal whether the employee was a union supporter, or asking employees to sign a petition or declaration opposing the trade union, and that such conduct constitutes a violation of the Act (see: *J. Pascal Inc.*, [1985] OLRB Rep. July 1075 and *St. Laurent I.G.A*, [1984] OLRB Rep. May 745). It is my determination that Mr. Robertson's conduct violates section 76 of the Act such that the first condition necessary for the application of section 11 has been met.

- Mr. Robertson asked four out of five of his employees to sign a declaration on December 6, 1995. The representation vote was held on December 8, 1995. The one employee who was not approached to sign a declaration was the only employee to cast a ballot. Although it is possible that three of the employees may not have voted because they were not scheduled to work on December 8, 1995, such would not explain why Mr. Grant, who was at work on December 8, 1995, did not cast a ballot. Having regard to Mr. Grant's behaviour, it is my determination that Mr. Robertson's conduct had the effect of discouraging the employees from attending at the job site on December 8, 1995 and casting a ballot, and, as a result, the results of the vote held on December 8, 1995 do not reflect the true wishes of the employees in the bargaining unit. Thus, the second condition necessary for the application of section 11 has also been met.
- 25. The third condition necessary for the application of section 11 requires the Board to be satisfied that no other remedy, including the taking of another representation vote, is sufficient to counter the effects of the violation. The Board has generally granted automatic certification in one of two types of situations. First, where an employer has made threats to the continued job security of its employees conditional on whether the union succeeded in its attempt to become certified, certification has followed automatically. Alternatively, where the cumulative effect of a range of unlawful employer activities, none of which taken separately might call the section into play, has the effect of undermining the confidence in the rule of law which a reasonable employee is presumed to have and which give a reasonable employee the confidence to make a free choice the Board has automatically granted certification to the union (see: *The Globe and Mail*, [1982] OLRB Rep. Feb. 189 at paragraphs 60 and 61).
- 26. In the instant case, neither of these two scenarios are present. Mr. Robertson's conversation with the employees was limited to asking them to read the declaration and, if they agreed with it, to sign it. Nothing he said to the employees would suggest that their job security depended on the company remaining non-union. The declaration itself indicates that, while employed by Maverick, it is the employee's wish not to be represented by a union. When read in context, and keeping in mind the brief opportunity the employees had to review the declarations, I am satisfied that the declaration would have been interpreted by the employees as an expression that they do not wish to have trade union representation with respect to their employment relations with Maverick and not as a threat that their employment was conditional on their not seeking union representation.
- 27. In addition, I would note that Mr. Robertson fully complied with all of the Board's procedures and directions. He filed a response and posted the required Board notices. When he approached the employees to sign the declarations, he did so after obtaining legal advice. He believed he was acting in accordance with the Board's Rules. While it is the effect of the violation on the employees that is of primary concern to the Board, and legal advice does not immunize an employer from the consequences of his or her actions, this background speaks to how Mr. Robertson behaved. I am satisfied that there would have been nothing in Mr. Robertson's behaviour that would have suggested to the employees that he would readily flout the law and penalize the employees if the union was certified.

- Regarding the second type of situation in which the Board would typically grant automatic certification, asking the employees to sign the declaration was an isolated incident of improper conduct such that it cannot be said that there exists a range of unlawful activity. In addition, at least two of the employees had previously been employed by unionized contractors such that it would be reasonable to assume that they are familiar with unions and their rights as union members. In light of these facts, it is my determination that the declarations alone would not have had the effect of undermining the employees' confidence in the rule of law.
- 29. The applicant relies on Ex-Cell-O Wildex, Canada, [1977] OLRB Rep. June 370; Kernohan Lumber & Sash Co., [1977] OLRB Rep. Oct. 676; and Zenith Wood Turners Inc., [1987] OLRB Rep. Nov. 1443, to suggest that a representation vote is not an adequate remedy where there is a very small number of employees in the bargaining unit.
- 30. In each of *Ex-Cell-O Wildex*, *Kernohan Lumber* and *Zenith Wood*, the employer was found by the Board to have committed violations of the Act involving threats to job security. Accordingly, the Board's comments in these decisions suggest that, in cases where the Board would typically grant automatic certification, the size of the unit is *a factor* to be considered in determining whether a vote would be an adequate remedy. The Board's comments do not stand for the proposition that, regardless of the nature of the violation committed, unfair labour practices committed in the context of a small bargaining unit, cannot be remedied.
- 31. Thus, I am not persuaded that the relatively small size of the instant bargaining unit necessarily leads to the conclusion that no remedy, including the taking of another representation vote, is sufficient to counter the effects of the violation.
- 32. The facts of this case are somewhat similar to those in *DI-AL Construction Limited*, [1983] OLRB Rep. Mar. 356, in which an employer assisted one employee, at the employee's request, in seeking to resign from the union and forwarded statements of desire in opposition to the union to the Board on behalf of the same employee as well as two others. There were five employees in the bargaining unit. The Board had no evidence before it as to how the employees came to sign the statements but inferred from the fact that they were sent to the Board by the employer that there had been employer involvement. The Board rejected the applicant's submission that the employer's involvement with the statements of desire was sufficient to trigger the applicant solely on the basis of the employer's involvement with the statements of desire and the first employee's resignation from the union.
- 33. Like the Board in *DI-AL Construction Limited*, I am not persuaded that the conduct in issue in the instant case warrants the application of section 11(1) of the Act. The conduct of Maverick was highly inappropriate. However, I believe that the adverse impact of Maverick's violation of the Act can be rectified in such a way as to enable to true wishes of the employees to be ascertained by way of a representation vote.
- As indicated above, I believe that Mr. Robertson's conduct may have discouraged the employees from casting a ballot on December 8, 1995. I do not believe, however, that they would have perceived a threat to their job security or had their confidence in the rule of law undermined. In my view, a Board order which would result in the employees being apprised of the fact that their being asked to sign a declaration was wrong, that they have the right to freely cast a ballot for or against the union, and that no consequence will accrue to them as a result of their doing so, would counter the effects of Mr. Robertson's conduct and enable the employees' true wishes to be ascertained by way of a representation vote.

- 35. Accordingly, I make the following directions:
 - 1. Maverick is directed to cease and desist violating the Act.
 - 2. Maverick is directed to post this decision and the attached notice, after being duly signed by Mr. Robertson, in a location or locations where they are likely to come to the attention of the employees and to leave this decision and the notice posted until the conclusion of the representation vote. Maverick is to make every reasonable effort to insure that the posted decision and notice are not defaced or obscured in any way.
 - 3. Maverick is directed to give reasonable access to the applicant to its premises at reasonable times so that the applicant can satisfy itself that the posting requirements are being complied with.
 - 4. Maverick is further directed to forthwith send a copy of this decision and the attached notice to each of the employees in the bargaining unit described in paragraph 6 above at their home address by regular mail.
 - 5. Maverick is to provide two representatives of the applicant with an opportunity to address the employees in the bargaining unit referred to in paragraph 6 above, out of the presence of any member of management, during normal working hours without loss of pay, for a maximum of one hour. Such meeting is not to be on the date the representation vote is held.
- 36. The representation vote held on December 8, 1995 is hereby set aside. The Registrar is directed to destroy the ballot within 30 days of this decision.
- A representation vote will be conducted among the employees of the responding party in the bargaining unit described in paragraph 6 of this decision. Those eligible to vote are all employees of the responding party at work in the bargaining unit on November 30, 1995.
- 38. The vote is to be held during normal working hours without loss of pay. The time, date and location of the vote is to be determined by the applicant provided the voting arrangements allow reasonable access to vote for those so eligible. The applicant is to advise the Registrar of the Board and the responding party of the time, date and location of the vote within 48 hours of receipt of this decision. In the event the responding party has any submissions it wishes to make on the vote arrangements chosen by the applicant, the responding party is to notify the Registrar of the Board and the applicant within 24 hours of receiving the applicant's vote arrangements.
- 39. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the responding party.

Appendix ... The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

MAYERICK MECHANICAL CONTRACTORS LIMITED HAS POSTED THIS MOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH THE UNION AND THE COMPANY HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD HAS DETERMINED THAT MAYERICK MECHANICAL CONTRACTORS LIMITED VIOLATED THE LABOUR RELATIONS ACT. 1995. AS A RESULT, THE BOARD HAS SET ASIDE THE VOTE WHICH WAS HELD ON DECEMBER 8, 1995 AND ORDERED THAT ANOTHER VOTE BE HELD. IN ADDITION, THE BOARD HAS ORDERED US TO IMPORT YOU OF YOUR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES:

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION:

TO ACT TOGETHER FOR COLLECTIVE BARGAINING:

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF YOU THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH YOUR RIGHT TO FREELY VOTE FOR OR AGAINST THE UNION IN A VOTE WHICH IS TO BE HELD IN THE HEAR FUTURE AND THAT. IF A MAJORITY OF THE EMPLOYEES VOTE IN FAVOUR OF TRADE UNION REPRESENTATION. MAVERICK WILL RECOGNIZE THE TRADE UNION AS THEIR BARGAINING REPRESENTATIVE AND WILL APPLY THE PROVINCIAL COLLECTIVE AGREEMENT AS REQUIRED BY LAW.

WE WILL NOT INTIMIDATE OR EXERT UNDUE INFLUENCE UPON YOU, WHETHER THROUGH MEETINGS. INDIVIDUAL CONVERSATIONS OR OTHERWISE, TO PREVENT YOU FROM EXERCISING YOUR RIGHT TO ASSOCIATE AND PARTICIPATE IN THE LAWFUL ACTIVITIES OR SYMPATHIES OF A TRADE UNION.

WE WILL NOT LAY OFF, DISCHARGE OR THREATEN TO LAY OFF OR DISCHARGE ANY EMPLOYEE BECAUSE OF THAT EMPLOYEE'S UNION ACTIVITIES OR SYMPATHIES.

WE WILL NOT IN ANY OTHER MANNER INTERFERE WITH OR RESTRAIN OR COERCE OUR EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS UNDER THE ACT.

WE WILL COMPLY WITH ALL DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD.

HAVERICK MECHANICAL CONTRACTORS LIMITED

PERI

HEIL ROBERTSON

This is an official notice of the Board and must not be removed or defaced.

3943-95-U; 3957-95-U David E. Smith et al (see schedule "B"), Applicant v. **Ontario Public Service Employees Union**, Responding Party. v. The Crown in Right of Ontario as represented by Management Board of Cabinet, Intervenor; Penny Sue Stewart, Applicant v. Ontario Public Service Employees Union, Responding Party v. The Crown in Right of Ontario as represented by Management Board of Cabinet, Intervenor

Ratification and Strike Vote - Strike - Unfair Labour Practice - Employees alleging that strike/ratification vote organized by OPSEU for 65,000 employees of Government of Ontario employed at 4000 work sites across province not satisfying new statutory requirements - Board satisfied that voting arrangements made by OPSEU, particularly times and places scheduled for voting, affording employees ample opportunity to cast ballots and reasonably convenient in all the circumstances - Application dismissed

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members S. C. Laing and P. V. Grasso.

APPEARANCES: David E. Smith and P. Stewart for the applicants; Paul Cavalluzzo, Louise Rose and Fay Farraday for the responding party; Robert Little and Malliha Wilson for the intervenor.

DECISION OF THE BOARD; April 12, 1996

- 1. Board File No. 3943-95-U is an application under section 96 of the *Labour Relations Act*, 1995 in which the applicant asserts that the responding trade union (the "OPSEU") has violated section 79(9) of the *Labour Relations Act*, 1995 by establishing a procedure for a ratification/strike vote which was not reasonably convenient and did not provide employees an ample opportunity to cast their ballots.
- 2. Board File No. 3957-95-U is an application under section 96 of the Act in which similar allegations are made against the OPSEU. In addition, the applicant asserts that the OPSEU has breached its duty of fair representation under section 74 of the Act.
- 3. These two applications both came on for hearing before this panel on February 15, 1996. When the hearing was convened, the OPSEU stated that the concerns of the applicant in Board File No. 3957-95-U had been addressed and moved that that application should therefor be dismissed on the basis that it was moot. The applicant was assured that she would be allowed to cast a ballot at the Olympic Harbour Sailroom voting location at 8:00 p.m. on February 15, 1996, and that attendance at the one half hour information session scheduled to precede the voting was not mandatory. The applicant was satisfied with this, and on the basis of those stipulations was content to withdraw her application. Accordingly, and without objection from the OPSEU the application in Board File No. 3957-95-U was withdrawn with leave of the Board.
- 4. The Board then proceeded to hear the application in Board File No. 3943-95-U on its merits. Upon hearing and considering the evidence of the parties, and the representations of the applicant and intervenor, the Board determined that it was not necessary to hear the OPSEU's representations and dismissed the application in a brief oral ruling.
- 5. Formerly section 74(6), section 79(9) of the Act provides as follows:
 - 79. (9) Any vote mentioned in subsection (7) shall be conducted in such a manner that those

entitled to vote have ample opportunity to cast their ballots. If the vote taken is otherwise than by mail, the time and place for voting must be reasonably convenient.

(emphasis added)

- 6. The second sentence of section 79(9) is new. It was added when the Act was amended effective November 10, 1995. This application raised for the first time an issue concerning the interpretation of the amended provision, which must be read as a whole.
- 7. Ultimately, there was little dispute about the facts material to the application, although there was some dispute about the conclusions that Board should draw from the facts.
- 8. The vote in issue in this proceeding concerned the proposed collective agreement tabled by the intervenor employer on or about February 6, 1996. The timing of the vote was dictated by a Board decision in an application under section 36 of the *Crown Employees Collective Bargaining Act*, as amended, in Board File No. 2629-95-M. After consulting with the parties in that case (the intervenor and responding trade union herein), the Board issued a decision dated November 24, 1995, which provided, among other things, that:
 - 10. upon the request of the employer the union shall conduct a vote on the Employer's Final Offers on all disputed matters of all applicable bargaining units, including disputed matters, in the central collective agreement (S. 25 CECBA. 1993);
 - 11. this vote shall be conducted no later than 14 days after the request of the employer, which shall not be made prior to the release of any no Board report in respect of any one of the six bargaining units or the Central Agreement. In any event the vote shall be no earlier than February 1, 1996;
 - 12. for the purpose of Section 44 and 79 of the Labour Relations Act 1995 ("the Act") this vote shall be conducted in accordance with Section 79 of that Act and shall also be a ratification vote under Section 44 of that Act;
 - 13. this vote shall be a strike vote for the purposes of triggering Stage 2 of the selection process of employees to perform essential and emergency services in Appendices A & B of the Central Agreement on Essential Services;
 - 14. this vote shall be deemed to be a vote, for this round of bargaining only under Section 42 of the Labour Relations Act 1995;
 - 15. the union may hold a vote on the offers of the employer on matters in dispute in respect of all applicable bargaining units including disputed matters in respect of the Central Collective Agreement to a vote of employees in the affected bargaining units within fourteen days of the union notifying the employer of such a vote or fourteen days from the receipt of the amendments of the employer by the Union described in paragraph 16;
 - 16. the union shall notify the employer of its intention to hold a vote described in paragraph 15. The employer may amend any of its offers on disputed matters and shall inform the union of such amendment(s) within 48 hours of notification of the union's intention to hold a vote described in paragraph 15. Upon receiving notification from the Union of its intention to hold a vote, the employer will forthwith inform the Union of its intention with respect to whether it will be amending its final offers with respect to any bargaining units. Where the employer informs the union of any amendment(s) to its offers within the above said 48 hours, the union shall hold the vote described in paragraph 6 on those amended offers;
 - 17. for the purposes of Section 44 and Section 79 of the Act, the vote taken in accordance with paragraph 15 and 16 shall be in accordance with Section 44 and Section 79 of the Act. The vote shall be a strike vote for the purposes of triggering Stage 2 of the selection process in Appendices A and B of the Central Agreement on Essential Services;
 - 18. where the employees in a bargaining unit vote in favour of the employer's offers in a vote

under paragraph 10, 15 or 16, that vote will constitute ratification if such a vote is conducted in accordance with Section 44 of the Act;

- 19. where the employees in a bargaining unit vote to reject the employers offers in a vote under paragraph 10 or paragraph 15 or 16 that vote will be a strike vote for the purposes of the applicable bargaining unit, if such vote is conducted in accordance with Section 79 of the Act;
- 20. a vote taken pursuant to paragraph 10, 15 or 16 shall be a vote on all issues in dispute by each of those employees in each of those designated bargaining units and the deemed bargaining unit (central) and shall take place simultaneously.
- 9. As a result, the vote on the intervenor's February 6, 1996 offer had to be completed by February 20, 1996.
- 10. Approximately 65,000 employees were entitled to cast ballots in this vote. These employees are employed in approximately 4,000 work sites spread across the Province of Ontario. There are heavy concentrations of employees in urban areas. Other employees are located throughout the province, some in remote locations.
- 11. The OPSEU is administratively divided into seven regions. In Region 5, which includes but extends somewhat beyond the Greater Toronto Area, there are approximately 20,000 employees in approximately 500 workplaces. Within each region there are numerous OPSEU Local Unions, all of which have employees in 4 to 6 bargaining units, all of which are effected by the vote in issue. In this vote, employees were entitled to vote in their bargaining unit and also in the central vote.
- 12. In late November and early December 1995, the OPSEU formed several committees to make and oversee the arrangements for the vote which was apparent would have to be held. This included Central Mobilization and Vote Procedures Committees, and also Service Area Co-ordinating Groups which were responsible for facilitating local vote arrangements and ensuring a fair vote. In the result, a vote protocol was developed. This protocol called for a vote to be held over the three day period February 15 to 17, 1996 at various locations across the province. Typically, the arrangements made contemplated a half hour information session followed by balloting in a large venue. Each OPSEU Local Union was assigned a specific time and place for its members to vote.
- 13. The applicants in this case are members of OPSEU Local 532, which is in OPSEU Region 5. Originally, members of this Local were advised that they could attend a meeting and vote at 4:00 p.m. on Saturday, February 17, 1996 in the Queen Elizabeth Building on the grounds of the Canadian National Exhibition in Toronto. Subsequently, four additional times on February 17, 1996 were scheduled at the same location.
- The applicants were not happy with these arrangements. Their normal work week does not include Saturday, which they alleged is also the case for many other bargaining unit employees. The applicants also asserted that many employees reside in communities other than those in which their workplaces are located, and that the voting locations established by the OPSEU were not located near either their homes or their workplaces. They also alleged that they had been led to believe that they would have the opportunity to vote on a weekday, and that previous votes, and specifically the vote held with respect to the proposed "Social Contract" agreement were held on a weekday at or near employees workplaces. Of the twenty-two applicants, only one. David Smith, took the trouble to attend at the hearing. Mr. Smith was the only witness who testified in support of the application.

- Mr. Smith testified that upon reading the notice the OPSEU caused to be posted advising members of Local 532 of the voting arrangements for that Local, he and a number of his colleagues made telephone calls to various people at the OPSEU to question the arrangements, and in the case of some of them to try to make alternate arrangements to cast their ballots. Indeed, ten of the applicants made such requests, five of which had been granted as of the morning of the hearing.
- 16. Although he questioned the voting arrangements, Mr. Smith did not ask to be allowed to vote at a different time or place, even though he knew that others had done so and that there was a voting location near his workplace which he passes daily on his way to and from work.
- Mr. Smith stated that it was inconvenient for him to travel from his home in Oshawa on a Saturday to cast his ballots at the C.N.E. in Toronto because he does not normally come to Toronto on Saturday. Mr. Smith conceded that he has travelled to Toronto on Saturdays or Sundays in the past for entertainment purposes but said that the voting arrangements didn't fit in with his plans for Saturday, February 17, 1996. He offered no explanation for not making a request to be allowed to vote at another time or place other than that he had to fill out a form to do so, and he didn't know if his request would be granted.
- The approximately 65,000 employees affected by the ratification/strike vote which this application concerned have not previously had a right to strike. The OPSEU was faced with organizing a vote which would give this large number of employees scattered over 4,000 workplaces across the province ample opportunity to vote at a reasonably convenient time or place, all within fourteen days. In order to manage this rather daunting task, the OPSEU formed committees at various levels, developed a voters' list for each Local which is circulated in each workplace so that necessary corrections could be identified and made, and arranged times and places for everyone to vote. In making voting arrangements, the OPSEU considered and tried to balance the logistical problems of holding a vote for such a large number of voters over such a large geographic area in a relatively short period of time, against the need to meet the requirements of the Labour Relations Act, 1995 and provide the employees with sufficient information and an adequate opportunity to vote. In the larger urban centres, like Toronto, the OPSEU was faced with a problem of finding large meeting locations near major concentrations of employees on very short notice, and with scheduling meetings so that knowledgeable and informed people could provide up-to-date information to employees who wanted it so that all employees would have a reasonable opportunity to make an informed decision and cast their ballots accordingly. The resulting vote arrangements were quite diverse and are set out in a 33 page voting schedule which forms part of the evidence before the Board. In making the vote arrangements, the OPSEU attempted to accommodate the needs of shift workers, employees with special work arrangements, employees in remote locations, the needs of physically challenged employees, and individual circumstances. In that latter respect, the evidence before the Board indicated that many individual requests for a change in voting time or place had been granted. There was no evidence that any had been refused. Among the reasons which the OPSEU accepted in allowing such requests were hockey tournaments, curling bonspiels, weddings, family commitments, travel plans, and religious reasons. Indeed, what it came down to was that any bargaining unit employee who presented him/herself at any open voting location would be allowed to cast his/her ballots, subject to those ballots being segregated pending a check on the entitlement of the employee to cast them.
- 19. It is true that the OPSEU did not publicize either the fact that employees could request permission to vote at other than the assigned time or place or that employees could simply appear at a voting location and cast their ballots. In the circumstances, that was quite understandable. It was important that the OPSEU do its best to ensure the integrity of the voting process. This

required the OPSEU to exert direction and control over that process, including when and where people could vote. Without the sort of structure which the OPSEU developed in this case, chaos may well have ensued, bringing with it the possibility of an unreliable vote result.

20. Section 79(9) of the Act requires a vote like the one in issue in this application to be conducted in a manner which provides employees with an ample opportunity to cast their ballots at a reasonably convenient time and place. Mr. Smith conceded that the legislation does not create any hard and fast rules in that respect and that a trade union has some leeway in the way it structures a vote. However, he argued that the amendment to the previous provision now contained in section 79(9) has introduced an additional standard such that convenience to employees must be given primary consideration.

21. We did not agree.

22. Section 79 of the Act deals with what is first and foremost an internal trade union issue: the taking of strike and ratification votes. Prior to the amendments to the Act in November 1995, it was up to a trade union to decide for itself whether to take any such votes, though if it did, what was then section 74 of the Act established certain minimum standards which such votes had to meet; that is, all employees in the bargaining unit affected, whether or not members of the trade union were entitled to an ample opportunity to participate in a vote which had to be by secret ballot. In dealing with an application which challenged propriety of a ratification vote in *The Great Atlantic & Pacific Company of Canada Limited*, [1995] OLRB Rep. Feb. 178, the Board commented that:

19. The Board's decisions interpreting section 74 have made it clear that, although a union is not required to hold ratification votes, if it does, it must comply with the sections. The purpose of the provisions has been set out most extensively in *R.C.A. Limited*, [1981] OLRB Rep. August 1159. As the Board there pointed out, the sections provide a minimum of protection, in a procedural way, but the wording is deliberately general. This is to be understood against the background of the statute's otherwise general approach - which is not to regulate closely the internal affairs of trade unions, except to the extent that they breach the duty of fair representation or referral set out in sections 69 and 70.

20. On the facts of this case as pleaded by the complainant, a case for the remedy of overturning the provincial ratification vote was simply not made out. The length of time between the posting of the notice and the meeting was not unduly short in the context of collective bargaining, which often runs on very tight timelines. A similar length of time of notice was found not to be a basis for interference in *Inter-Bake Foods Ltd.*, [1981] OLRB Rep. August 1145, even where there was a substantial amount of confusion as to the date of the meeting. No similar factor was pleaded here. There as well, people had plans which they did not wish to change, and thus did not attend the ratification meeting. The Board there held that the fact that many employees were inconvenienced by the timing of the meeting did not disclose a violation, and it is my view that the same is true of the facts pleaded before me. A requirement that the union hold out for the convenience of all 10,000 employees before scheduling a ratification vote is simply too impractical to impose. Nor is it illegal to hold the vote on a holiday, unless there were additional facts pleaded from which one could infer illegality. There are no such additional facts before me.

23. The November 1995 amendments to the Act make strike votes mandatory, except in the construction industry, (sections 79(3) through (5)). (Ratification votes are now also mandatory for negotiated collective agreements in other than the construction industry: section 44.) All strike and ratification votes must be by secret ballot and all such votes must be conducted in a manner such that all employees in the bargaining unit affected, whether or not members of the trade union concerned have an ample opportunity to cast their ballots. In addition, all such votes, other than those conducted by mail, must now also be held at a time (or times) and place (or places) which are "rea-

sonably convenient". Whether or not this latter addition to what use to be section 74(6) and is now section 79(9) of the Act is a legislative response to Board decisions like *The Great Atlantic & Pacific Company of Canada Limited, supra*, it is apparent that ample opportunity and reasonable convenience are not necessary the same thing, and that the intent of the addition is to raise the standards which both mandatory and discretionary trade union votes must meet. Consequently, while such votes remain primarily internal trade union matters and trade unions continue to have considerable latitude in the manner in which the organizing conduct such votes, they are subject to greater Board scrutiny than before.

- "Reasonable convenience" has been added as a specific factor to consider when the propriety of a ratification or strike vote has been placed in issue before the Board. However, the legislation does not require that this factor be given some sort of super added status or special consideration. Further, neither section 79(9) nor anything else in the Act suggest that it is only the convenience of bargaining unit employees which must be considered. That is, in considering whether a strike or ratification vote is being or has been held at a reasonably convenient time and place, the Board must consider all of the relevant circumstances, including the interests and convenience of the trade union, and not just the convenience of employees individually or as a group. Accordingly, what is "reasonably convenient" within the meaning of section 79(9) of the Act will depend on the circumstances of each case, and an objective assessment of a trade union's conduct in those circumstances. Further, a trade union is not required to make the best or most reasonably convenient vote arrangements. In most cases, there will be a range of arrangements which are reasonably convenient, and so long as the time(s) and place(s) for voting fall within that range, the requirements of section 79(9) will be satisfied. Neither section 79(9) or anything else in the Act gives any employee a "right" to have a strike or ratification vote conducted during working hours, at his/her workplace, or near his/her residence (whether or not s/he resides in a community other than where s/he works). The fact that a vote is taken at a time or place other than any of these does not necessarily mean that it will not be considered to be reasonably convenient.
- In this case, the applicants, through Mr. Smith, asserted that there were general systemic problems with the OPSEU's organization of the vote such that the arrangements made were not reasonably convenient for many bargaining unit employees. However, the evidence before the Board did not support either that general assertion, or the applicant's assertion that the voting arrangements for Local 532 were not reasonably convenient. 26.? On the contrary, the evidence showed that the OPSEU was faced with a ratification/strike vote in a very large bargaining unit spread over the entire province in a relatively short period of time, that it went about organizing the vote in a sensible way recognizing that it had to accommodate many diverse employee needs while preserving the integrity of the voting process, and that it was responsive to the needs and circumstances of individual employees. The applicant's complaint about what they alleged was a lack of information in that latter respect rang rather hollow in light of the fact that ten of them actually applied to be permitted to vote at other than one of the five times allotted to Local 532 to accommodate their individual circumstances, while Mr. Smith knew that he could do so but didn't. On the evidence, it appears that the OPSEU was willing to accommodate any individual or group circumstances, even without a specific application if a bargaining unit employee sought to vote at any open voting location. 27.?Indeed, Mr. Smith conceded in argument that the OPSEU had turned its mind to its obligations under section 79(9) and had addressed individual circumstances. Although he continued to maintain that the OPSEU had done too little too late in that respect, he was unable to suggest what more the OPSEU could have done in that respect, or what it was that the OPSEU had done or was prepared to do was either contrary to or did not meet the requirements of section 79(9) of the Act. Further, he abandoned the remedies sought in the application and was unable to suggest any other. Instead, he suggested that the Board should itself structure a remedy,

for a breach which he alleged but could not identify. In short, even Mr. Smith had very little to say in support of the application.

- Accordingly, having regard to the evidence before the Board, and the representations of the applicant (the intervenor quite properly in the circumstances taking no position with respect to how the application should be decided), the Board was satisfied that the voting arrangements made by the OPSEU for the ratification/strike vote in this case, and particularly the times and places scheduled for the voting, afforded employees an ample opportunity to cast their ballots and were reasonably convenient having regard to all the circumstances. The Board was satisfied that no violation of section 79(9) had been made and the application was therefor dismissed.
- Finally, we note that the Board received several faxes from persons reporting to the employees entitled to cast ballots in the vote in issue before the Board herein. Some arrived prior to the hearing on February 15, 1996 and some after. None of the persons whose names appear on these communications appeared before the Board. None of the letters constitute a proper application to the Board. Nor could any of them been considered by the Board to have been "evidence" in this proceeding. Finally, because one of the fax communications requests a Board "investigation" we wish to point out that the Board is a quasi-judicial administrative tribunal, not an investigatory body. The Board adjudicates labour relations disputes brought before it between parties adverse in interest. Those parties are obliged to properly state and present the respective cases to the Board, generally in a formal legal proceeding where evidence is presented under oath and legal argument is made.
- 30. The Registrar is directed to advise the individuals who sent faxes to the Board with respect to the applications herein of the steps they must take in order to bring any complaint they have with respect to the voting issue before the Board. In cases where more than one person's name appears on a fax the person whose name appears first is the one with whom the Registrar should communicate, as a representative of all the persons whose names appear on it.

2181-95-U; 2182-95-R; United Steelworkers of America, Applicant v. ASM Dispensaries Limited c.o.b. as **Shoppers Drug Mart**, Responding Party v. Group of Employees, Objectors

Certification - Certification Where Act Contravened - Interference in Trade Unions - Intimidation and Coercion - Reconsideration - Unfair Labour Practice - Board finding that employer removal of key inside union organizer from workplace and subsequent reassignment tainted by anti-union animus - Board also finding that various steps to increase managerial presence in workplace during organizing campaign coloured by anti-union motivation - Board certifying union under section 9.2 of "old" Labour Relations Act - Employer seeking reconsideration of decision on grounds that "bottom line" decision (without reasons) issued on November 10, 1995 was not "final" decision for purposes of transitional provisions of Bill 7 - Employer submitting that Board ought to have decided case under section 11(1) of "new" Labour Relations Act - Board noting that absence of reasons not undermining dispositive effect of "bottom line" decision and that Bill 7 requiring that "new" Act apply retroactively only where no final decision having issued on November 10, 1995 - Reconsideration application dismissed

BEFORE: Jerry Kovacs, Vice-Chair.

APPEARANCES: Mark Rowlinson, Allison Collier and Rhonda McKellar for the applicant; A.D.G. Purdy and A. Mandel for the responding party; Gilda Lazaroff and Susan Godell for the Group of Employees.

DECISION OF THE BOARD; April 22, 1996

- 1. This is an application for certification together with a complaint of contravention of the *Labour Relations Act*. The applicant contends that this is an appropriate case for unfair labour practice certification'.
- 2. Both matters were filed on September 6, 1995 and were heard by the Board in October of 1995. The governing statute at those dates was the *Labour Relations Act*, R.S.O. 1990, c. L.2, as amended by certain Acts between 1991 and 1994.
- 3. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the Act.
- 4. The applicant complained under section 91 that the responding party committed a number of unfair labour practices during the union's organizing campaign, and asked the Board to issue a certificate pursuant to section 9.2 of the Act. In the applicant's submission, the true wishes of employees with respect to representation by the trade union were not likely to be ascertained because ASM Dispensaries Limited c.o.b. as Shoppers Drug Mart contravened sections 65, 67 and 71 of the Act.
- 5. On November 10, 1995, the Board issued a "bottom-line" decision, indicating that reasons would follow. The decision disposed of the matters as follows:
 - 3. The Board declares that the responding party has contravened sections 65, 67 and 71 of the *Labour Relations Act*, and orders the responding party to reassign Rhonda McKellar to the shift to which she was assigned prior to July 26, 1995. Further, the Board finds that as a consequence of the employer's unlawful conduct, the true wishes of employees respecting representation by the trade union are unlikely to be ascertained.
 - 4. At the hearing the parties indicated that they had agreed upon the following bargaining unit description:

All employees of ASM Dispensaries Limited c.o.b. as Shoppers Drug Mart at 3003 Danforth Ave. in the Municipality of Metropolitan Toronto save and except Assistant Merchandise Manager, Pricing Systems Manager, Head Cashier, Head Beauty Advisor, persons above the rank of Assistant Merchandise Manager, Pricing Systems Manager, Head Cashier and Head Beauty Advisor, Pharmacists, office and clerical staff.

A certificate will issue to the applicant in respect of that bargaining unit.

- 6. On December 13, 1995, the employer requested that the Board reconsider its decision dated November 10, 1995. In essence, the employer asserts that the Board ought to have applied the provisions of the *Labour Relations Act*, 1995, which came into force on November 10, 1995. The trade union responded to the employer request and the Board has considered the parties' submissions.
- 7. This decision contains both reasons for the decision dated November 10, 1995 and and a ruling disposing of the request for reconsideration.

Reasons for November 10, 1995 Decision

I. The Facts

- 8. The responding party ASM Dispensaries Limited (hereinafter referred to as "ASM" or "the employer") carries on business as Shoppers Drug Mart at a store on Danforth Avenue in Toronto. Its owner, Arthur Mandel, has operated the business since April of 1994 pursuant to a franchise agreement with Shoppers Drug Mart.
- 9. Following the general pattern of in-store management at Shoppers Drug Mart stores, the management team at ASM consists of a Merchandise Manager, an Assistant Merchandise Manager, a Head Beauty Adviser, a Head Cashier, and a Store Accountant, and Mandel. In addition to pharmacists, the store is staffed by pharmacist assistants, cashiers, merchandisers, beauty advisers, receivers, stock boys, and Post Office clerks. There are 43 employees in the bargaining unit which the parties have agreed is appropriate for the purposes of the union's certification application, including both part-time and full-time employees.
- 10. The assignment of full-time employees is generally split between a 9:00 a.m. to 5:00 p.m. day shift and a 4:30 p.m. to 12:00 a.m. night shift. Some day shift cashiers work from 10:00 a.m. to 5:00/6:00 p.m. Part-time workers generally work a shift that runs from 4:45 p.m. to 10:00 p.m.
- 11. The franchise arrangement requires ASM to remit fees to Shoppers Drug Mart head office, in return for which it receives, among other things, the services of head office personnel. This head office group includes persons who specialize in various areas of store management and who provide their services to the numerous franchisees or "associates" of the Shoppers Drug Mart chain of stores. At least 6 persons from head office were involved in the events related to the case before the Board: Colin Campbell (Director of Employee Relations), Mitch Danker (of the Human Resources Department), John Nielsen (Personnel Co-ordinator, Ontario Region), Larry Thorne (of the Operations Department), John Taylor (Director of Operations, Central Region) and Stacey Markle (Loss Prevention Co-ordinator, Central Ontario).
- 12. Of the head office group that was involved in the actions and decisions taken by the responding party, only Nielsen and Markle testified in the hearing of these matters.
- 13. In addition to Nielsen and Markle, the Board also heard the testimony of Arthur Mandel, the store owner, and of Rhonda McKellar, an employee who was the sole organizer in the union organizing campaign. In reaching my findings of fact, I have carefully considered factors such as the demeanour of the witnesses during testimony, the clarity and consistency of that evidence when tested in cross-examination, the witnesses' ability to recall events and conversations, the witnesses' ability to resist the tug of self-interest in providing their answers, and what seems most probable in all the circumstances.
- McKellar has worked at the store operated by ASM since September of 1992. For some 14 years prior to her current placement, she worked at other Shoppers Drug Mart stores. Her mother (Jackie Glover, who as Head Cashier, is a manager) and two of her sisters (Brenda Glover and Lori Glover) also work at the ASM store. At the time that she commenced the organizing drive, McKellar was classified as the night cashier supervisor, a position with minor supervisory duties that nonetheless falls within the proposed bargaining unit. She worked four days per week, Sunday through Wednesday. She worked the night shift that commenced at 4:30 p.m. and ended at 12:00 a.m., the store's closing time.

- Prior to May of 1995, the employer's practice was to assign one of its managers to work until 9:00 p.m. each evening. No manager would be on duty from 9:00 p.m. until the store closing at midnight. That changed slightly in late May such that the assigned manager stayed until 10:00 p.m. each evening; however, it remained the employer's practice to have no manager on duty after 10:00 p.m. until the store closed at midnight. On the four days per week that she worked, McKellar was entrusted with a key used to lock the store upon closing.
- McKellar first contacted the Steelworkers' union on May 4, 1995. She met with Allison Collier, a union staff representative, the next day. They reached the understanding that McKellar would be the sole organizer. Collier advised McKellar to conduct organizing efforts only before and after work shifts or during work breaks, and McKellar says that she did not approach employees during working hours. In her view, the campaign began well, with between 12 and 15 employees signing union cards in May. McKellar had a sense of who might support and who might oppose a union, and she directed these early efforts towards those whom she believed would support the union. All of those whom she first approached signed cards.
- 17. The existence of the organizing campaign came to the attention of Mandel and Shoppers Drug Mart head office soon after McKellar began her organizing efforts in early May. Mandel was uncertain as to whether someone spoke to him directly about the campaign or whether he merely overheard employees' discussions of the matter. (In examination-in-chief, he said that he did not speak to anyone directly about the union. In cross-examination, he said that he may have had direct discussions with employees or he may have overheard employees in conversation.) In any event, he contacted head office to seek advice on what he should or should not do. Thereafter, there was general knowledge at head office that an organizing campaign was ongoing at ASM.
- 18. Mandel spoke first with with Colin Campbell, the Director of Employee Relations at the Shoppers Drug Mart head office. Campbell sent head office staff members to discuss the union campaign with Mandel. One was Larry Thorne (of the Operations Department), who Mandel described as "my operations co-ordinator" and who was a regular contact for Mandel. The other was Mitch Danker of the Human Resources Department, who was assigned primarily to advise regarding the union campaign. The three men decided to call a meeting of employees to permit Mandel to express his position regarding a union in the store. Although Mandel did not want a union in his store, he understood that it was a matter for the employees to decide.
- 19. Mandel called two meetings on May 18 and 19 to ensure that all employees would have opportunity to attend. Although described as an "emergency meeting", Mandel said that calling a meeting in such a fashion was not unusual and that his management team calls many emergency meetings. At the May meetings, Mandel, Danker, Thorne, and members of the in-store management team were present as well as many of the employees, including McKellar. Mandel read and distributed copies of a letter that expressed his views and encouraged employees to consider "ALL the facts" before deciding whether to support the union.
- 20. McKellar's success rate in obtaining union cards slowed after the May meetings. A few persons signed cards in late May and at the start of June. However, at the start of June, McKellar learned of the circulation of a petition in opposition to the union. As the parties and the Board gleaned from copies of the petitions which had been edited to protect the identity of employees, most of the petitioners (21 of them) signed on May 30. Eight more persons signed between May 31 and June 2, and one more signed on June 10. During this period, McKellar found that employees were less willing to associate with her. She obtained only two more cards during June. At the same time, the union staff representative advised McKellar that she would have to re-sign any supporters who had subsequently signed the petition. In general, McKellar became discouraged during June.

- There were other changes at the store in the month of June. Head office staff appeared in the store more regularly after the May emergency meetings. In particular, McKellar found that "Larry Thorne and Mitch [Danker] would be there until 11:30 [p.m.]" despite the fact that this had never occurred before May. The two men would either sit in Mandel's office, where there are store surveillance cameras, or they would walk about the store. McKellar says they talked to employees, but never to her.
- Also in June, McKellar believed Mandel was attempting to intimidate her when she shopped in the store during off-duty hours. On one particular instance, it seemed to her that Mandel awaited her at the end of each aisle in the store, as if to be sure she was not speaking to any of the employees. Mandel denied that he had ever followed McKellar in such a fashion or that he had ever attempted to intimidate her. Having considered each person's testimony, and in particular McKellar's admission that she was generally fearful at that time that management was aware that she was the inside organizer, I am not persuaded that the evidence discloses that Mandel was following McKellar around the store. McKellar's perception of events may have been skewed by her fear of discovery as the union activist.
- 23. McKellar further described, in detail, her version of a discussion with Mandel on June 29. In essence, she claims that McKellar called her into his office, closed his door and said "let's talk about the union". When she told Mandel that she did not know what he was talking about, he again said, "no, no, let's talk about the union." When McKellar tried to change the topic of discussion, Mandel purportedly said that he could get her to say anything he wanted her to say, by which McKellar understood him to mean that he could get her to tell him what he wanted to know about the union. Mandel flatly denies that he ever attempted to discuss the union with McKellar.
- Despite little success in her efforts in June and despite her fear that management knew her role in the process, McKellar continued the organizing campaign. She described July as a "good month" for signing. She re-signed a number of persons who had signed the petition and signed some employees who had not signed cards before the circulation of the petition. Upon review of the file, the Board notes that 12 cards of the 20 membership cards submitted with the certification application bear dates of July 9 through July 26. (I note also that 3 of the cards are lost', in that the persons who signed them did not appear on the list of 43 employees. Further, 8 of the persons in respect of whom union membership evidence was submitted also signed the later petition in opposition to the union, which was submitted to the Board in a timely fashion.) Five of the July cards were signed during the three shifts that McKellar worked on July 24-26. McKellar believed that the campaign was going well and that she might soon have more than 55% of employees signed in support of the union. By her count, there were 39 or 40 employees, and she now had 20 cards. Beyond the 20 employees who had signed cards, she had spoken to others who were as yet undecided and had said they would get back to her.
- 25. On July 26, Mandel called McKellar at her home to arrange for a meeting. The meeting was scheduled for July 30, when McKellar was next due at the store. McKellar carried a concealed audio-tape recorder. The meeting, in Mandel's office, was conducted by Colin Campbell, the Director of Employee Relations from the Shoppers Drug Mart head office. Also present was Stacey Markle, from the Loss Prevention Department at head office. Mandel was unable to attend most of the meeting because a family issue had arisen.
- 26. The audio-tape record of the meeting was played before the Board as evidence and its accuracy was not challenged. Campbell told McKellar that John Nielsen (from the head office Human Resources Department) was doing an investigation into employee complaints that McKellar was harassing employees. Nielsen was on vacation, Campbell said, "so I got to come down".

According to Campbell, McKellar was threatening employees "regarding their performance on the job and for activities that are outside the store and what their job requirements are". When McKellar sought particulars of the accusations, Campbell told her to concentrate on the hours between 10 p.m. and midnight (when ASM formerly had no managers on duty), and said that employees' sense of being threatened "has to do around the issue of how they want to maintain the store and not maintain the store". McKellar continued to press for details of what exactly Campbell meant. He went on: "...the issues seem to be revolving around...in their point of view they are being threatened to sign union cards." Campbell explained that they were conducting an investigation to find out exactly what the actual story was. McKellar pleaded ignorance. Campbell pushed on: "...So once again, you are not aware of any situations in which you would have tried to compel or encourage employees to sign union cards". In the end, Campbell told her that he had recommended that Mandel order her to stay at home with pay "for a couple of days" to allow for further investigation. He left the office to speak with Mandel, and the two of them returned to confirm the conclusion.

- Apart from the references to union organizing, no other specific examples of harassment were mentioned. I would also note in particular that Campbell did not refer only to McKellar's actions "threatening" employees to sign union cards. He also asked whether she tried to "encourage" employees to sign union cards (which, unlike threatening, is not necessarily prohibited activity). As I describe below, this is significant in that the employer never pursued its suggestion that McKellar or the union contravened the *Act* by intimidating or coercing employees during the organizing drive. And despite the employer's position that it was compelled to deal with harassment problems unrelated to union activity, nothing of the sort was put to McKellar.
- 28. Colin Campbell did not testify in these proceedings. However, Arthur Mandel, John Nielsen and Stacey Markle testified about the employee complaints and the investigations that led to the July 30 meeting conducted by Campbell.
- 29. Mandel testified that two employees had come to him with "some issues" they had with respect to a certain individual in the store. Mandel could not recall who had approached him, nor could he recall the conversation other than that the gist of it was that there were problems between McKellar and other employees. He told them that the matter was beyond his scope and that he would call his head office resource people. Mandel called Colin Campbell, and the two decided that John Nielsen and Stacey Markle should interview the employees who had come to Mandel. It was arranged that Mandel would send the employees out of the store to meet with Nielsen and Markle on July 21. (Although Mandel knew which 4 employees he would direct to Nielsen and Markle, he was unable to explain why he could not recall who might have approached him in the first place.)
- 30. On Campbell's instruction, Nielsen attended at the ASM store to conduct the interviews. Before going out to the store, he was aware that there was some union activity at the store. It was by then a matter of general knowledge in the office. (Nielsen is part of a group of four persons, including Mitch Danker, that form the Human Resources group at head office.) As he was led to understand, his role in the entire matter was simple. He was merely expected to go in to take statements "because [he] was unbiased". He and Markle took the statements on Friday, July 21 and passed them on to Colin Campbell on Monday, July 24. Campbell was on the phone at the time. At no time did he discuss the interviews or the situation in the store with Campbell or Mandel.
- 31. Nielsen had done investigations regarding harassment on other occasions. In his view, it was normal to speak to all those involved, including the accused, and he commented that the nor-

mal process in such investigation results in "an action plan" (which was not apparently the case with McKellar). Furthermore, it was usually the store owner who conducts such investigations. As he put it at several points in his testimony, he was "just following instructions" in this case and that he "was only asked to take the statements" at the store on July 21.

- Markle was directed to attend by her supervisor, John Taylor, the Director of Operations for Central Ontario. She had been to the ASM store a couple of times before and was acquainted with a couple of the employees, including two of the four she and Nielsen eventually interviewed. Although she had been employed in the head office for only a few months, she had participated in 3 harassment investigations. Like Nielsen, she had some general knowledge of union activity at the ASM store before attending there to conduct the interviews. However, she and Nielsen had "no idea" of the substance of the harassment complaints in respect of which they were asked to conduct interviews. She echoed Nielsen's summary of their role in the matter: "...Our function was simply to take these things and pass them along".
- 33. On July 21, Nielsen and Markle waited in a parked car near the store. Markle advised employees where to find Nielsen and Markle. Four employees Helen White, Denise Rose, Paul Verayo and Sue Godell each took a turn being interviewed in the car. Nielsen and Markle started each interview by reading the Shoppers Drug Mart harassment policy to the employee. They advised each employee that they were taking statements for use by Mandel, and asked what information the employees would like to pass on to Mandel. Nielsen asked most of the questions, and Markle recorded the interview. At the end of each interview, Markle's notes were signed by the employee, Nielsen and her.
- 34. The statements disclose that McKellar was involved in union organizing. However, a greater portion of the content of the statements reveals an ongoing dispute between certain employees and McKellar's family. McKellar's mother, Jackie Glover, is the Head Cashier but was away on a stress leave' during the events of this case. The Acting Head Cashier was Helen, one of the four who signed statements. There is obvious tension between her and McKellar. Another of the four who gave a statement was Denise, and much of her complaint was focused on McKellar's sister Brenda. Although that statement suggests that Brenda was harassing employees, the employer took no action with regard to Brenda. In general, Markle conceded that the four statements revolved largely around a dispute or ongoing tension between Helen and others versus McKellar's family.
- Aside from details of tension between workplace factions, the statements very clearly link McKellar to union organizing efforts. The statements were given to Colin Campbell. Mandel also reviewed them. Just after the interviews, Mandel called Markle to advise that he had received 2 additional statements from employees Paul Verayo and Linda Ellis. She told him to give them to Colin Campbell. In one of those additional statements, dated July 23, Paul Verayo complains that McKellar was repeatedly asking him to sign a union card during the working hours after 10 p.m. till midnight (i.e., when no manager was generally on duty). He also states that McKellar told him that she needed only a couple more signatures for union certification.
- 36. Mandel was vague in his recollection as to whether this was the first time that he had reason to believe that McKellar was organizing for the union. As he put it, "people were talking, there were rumours". In any event, he said that he did not pay any attention to any of the statements. This presumably included the claims in the statements that McKellar was organizing during work hours. Colin Campbell, however, made an issue of it at the subsequent July 30 meeting with McKellar. She denied it then and denied it again in cross-examination during her testimony before the Board. There was no evidence that contradicted her statements.

- 37. What happened after July 30? Although the purported purpose of McKellar's removal from the store "for a couple of days" was to allow for further investigation, none was undertaken. The employer offered no evidence regarding any further action on its part during the length of McKellar's absence. The employer apparently investigated no further, although Mandel was approached by two employees. They presented him with two additional statements mentioned above.
- 38. There was no explanation offered generally to the employees about McKellar's absence from the store. Mandel testified that he spoke only to McKellar's sister Brenda since he expected people would be asking her what had happened. He told her that there were allegations of harassment. Mandel later suggested that he thought that he probably spoke to others, but offered no particulars in that regard. He offered no details other than these. As he summarized, he "thought it was best handled quietly". McKellar testified that other employees did not know why she had been suspended. According to her, one employee thought that McKellar had been dismissed.
- 39. In addition to being suspended from work with pay as of the conclusion of the July 30 meeting, McKellar was barred from the store. (I use the term "suspended" for ease of exposition; it does not indicate a legal conclusion that McKellar's removal from the store with continuing pay constituted a "suspension".) The "couple of days" at home stretched into weeks. In the middle of the period, on August 8, McKellar called to ask Mandel whether she could come into the store to shop. He told her that it was out his hands', that she could not come into the store, and that he could not talk about it. Except for that call, McKellar had no communication from the employer until some 3 weeks after the July 30 meeting. On August 19, Mandel called to ask McKellar to attend at a meeting on August 22 for the purpose of arranging her return to work. In other preparation for the meeting, Mandel also asked Stacey Markle from the Shoppers Drug Mart head office to attend, although the two had no discussion about what should or would happen in respect of McKellar. Markle was unaware of what decisions had been made in respect of McKellar, and learned only as a witness to the meeting.
- 40. At the August 22 meeting, McKellar again carried a concealed audio-tape recorder. The tape was played before the Board as evidence and the accuracy of its contents were not challenged. Mandel referred to the signed statements that were mentioned at the earlier meeting. Again, neither the names nor the details of the statements were provided. There was minimal reference to any further investigation: "...we talked to other people who said "I heard that, I remember that", that kind of thing. So we've got corroboration there." Nothing in particular was said about the two additional statements that were received after the interviews conducted by Nielsen and Markle. No explanation was offered for the 3 week delay. None was ever offered. In testimony at the hearing of this case, Mandel commented that "unfortunately my company [presumably a reference to the head office] takes longer" to deal with such matters.
- 41. At the August 22 meeting, Mandel advised McKellar both orally and through a written "final warning" that he was transferring her to a different shift. At the hearing, he explained that there was increased business during day hours and that there was therefore an opportunity to use McKellar on a unique day shift. He also explained in his testimony that he needed to do something to deal with the harassment complaints, that it is his responsibility to try to keep 50 people happy. At the meeting, Mandel advised McKellar that she would be working a 10:00 a.m.-3:30 p.m. shift (one to which no other employee is assigned), that she would no longer have supervisory authority and that she would no longer hold a store key. There was no change in her pay rate. Finally, Mandel warned her that if there were any further incidents of harassment, he would have to "let her go." McKellar raised no objection at the meeting. In particular, she said nothing about the child-

care costs that this change would cause. In testimony at the hearing, Mandel also noted that McKellar had at some earlier time made it known that she would eventually prefer to work days.

- Near the end of the meeting, Mandel left the office for a short time. At that point, Markle told McKellar that she ought not to feel singled out. She told her that Mandel valued her as an employee: "Art really didn't have a choice...it was out of his hands...". Mandel then returned with a copy of a written "final request for performance improvement". It stated that "several employees complained that Rhonda was harassing them during work; John Neilson and Stacey Markel were called in from central office to investigate." It confirmed that McKellar would no longer have supervisory authority and that she would no longer hold a store key. It warned that she would be terminated if there were "any more charges of harassment (substantiated)".
- 43. Although Mandel has never suspended anyone else, he described the suspension of McKellar and the issuance of the final warning as "very normal" and consistent with "normal store procedure".
- 44. In providing a rationale for its actions, the employer did not rely on any allegation that McKellar was breaching a store rule that prohibited organizing during working hours. Mandel, who took full responsibility for the decision-making, admitted that the decision to suspend McKellar was based solely on his review of the statements that head office had gathered and on Colin Campbell's report of the interview with McKellar on July 30. Although he had an idea that McKellar was the inside organizer for the union, the effect that her suspension from work and exclusion from store premises would have on her organizing efforts "didn't even cross his mind". His decision was based on Colin Campbell's advice on the matter of the harassment complaints: the best way to handle the situation was to defuse it, to send McKellar home with pay, to do a little further investigation. Mandel felt that this would serve to make those working at the store more comfortable.
- 45. After August 22, McKellar returned to work. No one else worked the shift to which she had been reassigned. Her shift started after the start of the day shift to which most employees' were assigned, and before the shift changes (which occur between 4:30 and 6:00 p.m.). As a result there was less opportunity to meet with other employees before and after shifts. Nonetheless, she made some continuing efforts to seek support for the union. During her suspension, she spent some time at a coffee shop near the store and on a bench outside the store, hoping to run into other employees. She also phoned about 5 employees at their homes. According to McKellar, employees were afraid to get involved. She said she got similar responses in efforts she made after her return to work on August 22.
- 46. McKellar noticed further managerial changes upon her return to work after August 22. After her suspension, someone from the in-store management team was on duty until midnight. In addition, head office personnel Larry Thorne and Bill Rustice were present between 9:00 p.m. and midnight. After Mandel acknowledged that there had been changes, but explained that in the time since May of 1995 Shoppers Drug Mart has been in the midst of a major transition in their methods of doing business. Another reason for extension of management presence until store closing was the need that was expressed by employees in a staff survey conducted in January of 1995.

II. Violations of sections 65, 67 and 71

47. The applicant argued that the responding party had committed a number of unfair labour practices. In the applicant's submission, the following provisions of the Act were contravened:

- 65. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.
- 67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,
 - (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
 - (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
 - (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.
- 71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.
- 48. Section 91(5) prescribes the burden of proof that applies in respect of a number of the allegations of unfair labour practices:
 - 91.-(5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to the person's employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.
- 49. In Royal Homes Limited, [1992] OLRB Rep. Feb. 199, where the applicant union sought unfair labour practice certification' under the predecessor provision to section 9.2, the Board summarized its approach to allegations where the reverse onus provision of section 91(5) applies:

40. In the *Barrie Examiner*, [1975] OLRB Rep. Oct. 745, the Board set out its approach to allegations where section 91(5) applies:

17. What then is the extent of the burden of proof that has been shifted by statute to the respondent? The Act speaks of the burden of proof "that any employer ... did not act contrary to this Act". In its earlier decisions, this Board has stated that, even if only one of the reasons for a discharge related to union activity, the discharge would nevertheless constitute a violation of the Act. For a review of this jurisprudence, see *Delhi Metal Products Ltd.*, [1974] OLRB Rep. July 450. In other words, the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the

effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

41. Subsequently, the Board reiterated in

The Corporation of the City of London, [1976] OLRB Rep. Jan. 990 that the anti-union motivation does not have to be the sole reason, or even the predominant reason for the activity complained of to violate the Act, so long as it is one of the reasons. Then in *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, the Board described the difficulties inherent in this kind of proceeding:

- 5. In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous antiunion conduct and any other "peculiarities". (See National Automatic Vending Co. Ltd. case 63 CLLC 16,278). If, having regard to the circumstantial evidence, the Board cannot satisfy itself that the employer acted without anti-union motivation, the Board must find that the employer has violated the Act. These determinations, however, are most difficult and require an incisive examination of all the evidence. Not only must the Board "see through" the legitimate reasons which often co-exist with the unlawful, but at the same time the Board must be capable of distinguishing between the unlawful and the unfair. The Board cannot find, and neither should it automatically infer, that an employer who has engaged in conduct which is unfair has violated the Act even if the unfair treatment is coincidental with an organizing campaign. However, because of the nature of the proceedings and the frequent requirement for inferential reasoning the Board would be delinquent if it did not consider, for purposes of drawing an adverse inference, unfair treatment during an organizing campaign of itself or in conjunction with the other circumstantial evidence. The Board, therefore, must be acutely sensitive to all of the circumstances and must not be unduly swayed by either the co-existence of unfair treatment or by the co-existence of legitimate reasons for the employer's conduct in determining if The Labour Relations Act has been violated.
- 42. In the case at hand, we have examined the reasons advanced by the respondent in some detail for the various activities alleged, not because we are adjudicating their reasonableness or their justness, but because it is "a step in the more complex process of ascertaining the employer' motivation" (Hallowell House Ltd., [1980] OLRB Rep. Jan. 35).
- 50. Bearing that approach in mind, I turn to the union's allegations that certain employer activities were motivated by anti-union animus, whether wholly or in part.
- 51. First, I note that there is no allegation of impropriety regarding the meetings called by the employer on May 18 and 19 where Mandel expressed his views on the union. However, they form part of the context in which subsequent employer actions were taken. Mandel learned of the organizing campaign just prior to those meetings. His recollection of the source of that information was imprecise. Mandel did recall that the first person he called was Colin Campbell at Shoppers Drug Mart head office. As the evidence discloses, Campbell played the critical role in providing advice to Mandel in dealing with the organizing campaign.
- 52. After the initial contact from Mandel, Campbell assigned other head office personnel to assist directly at the ASM store. In addition to Larry Thorne, who had an ongoing relationship with Mandel in provision of operations advice, Mitch Danker was assigned to assist Mandel in

dealing with the organizing campaign. Mandel wanted advice on what he could or could not do in responding to the campaign. Having considered his testimony in whole, including his admission of opposition to the trade union, I find that he genuinely sought to act within the law. Understandably, he believed that he could rely on the advice of the experienced resource people' at his head office. However, I have concluded that the advice he received, the actions head office personnel took on behalf of ASM and Mandel, and the actions that Mandel took based on head office advice and actions were tainted by anti-union motive.

- Turning to the specific incidents about which the union complains, most notable was the removal of McKellar from the workplace on July 26 in midst of renewed success in her organizing campaign. As the tape-recorded statements of Campbell at the July 26 meeting disclose, the only specific incidents of alleged harassment that were put to McKellar involved her union organizing efforts. Although McKellar was told that she would be home for only "a couple of days" in order to permit further investigation of the harassment complaints, she was kept out of the workplace for 3 full weeks.
- 54. In fact, no further investigation occurred. No other "substantiation" of complaints was particularized. No reason was given for the lengthy three-week period that McKellar was barred from the store. When meeting with Mandel to discuss her return to work, McKellar was told orally and in writing that any further harassment would result in her dismissal. This warning must be considered in light of the fact that the only specific example of harassment mentioned by the employer was that of her union organizing efforts. Mandel offered nothing further in his August 22 meeting with McKellar or in his testimony before the Board. Campbell never offered testimony. Even if in Mandel's mind there was legitimate business rationale for dealing with strife within the cashier group, the employer did not act solely in accordance with such rationale.
- 55. Mandel's treatment of McKellar was based on the investigation conducted by head office, on the interview of McKellar conducted by Campbell, and on Campbell's advice. As the employer witnesses' admitted, the information they gathered gave them an idea that McKellar was the sole union organizer. In addition, there was information that McKellar was telling others that she was close to success in signing a majority of the employees. Campbell never disclosed any example of harassment other than that related to union organizing efforts and so failed to provide any alternative rationale for the purpose of investigating McKellar. I find that Campbell's advice and Mandel's actions based on that advice were not free of anti-union motive. Indeed, the employer failed to present a cogent case of what non-union concerns motivated its actions in respect of McKellar.
- I have no doubt that Mandel is genuinely concerned about the workplace tension that exists between McKellar's family and Helen and other employees. The statements gathered by Nielsen and Markle suggest such a problem. Indeed, there is suggestion that McKellar's sister Brenda is also accused of "harassing" employees. If the employer's sole concern was to deal with harassment unrelated to the union, why was no investigation undertaken with respect to Brenda? Instead, the employer took no action in respect of anyone other than Rhonda McKellar. In its interview with McKellar regarding the harassment complaints, the employer's representative, Campbell, did not pursue anything other than McKellar's union activity. Moreover, the procedure undertaken in the harassment investigation' in this case was unusual in that it varied from the experiences and expectations that Nielsen and Markle described with respect to other Shoppers Drug Mart harassment investigations'.
- 57. I also note the absence of any allegation by the employer that McKellar's conduct of union activity amounted to intimidation or coercion that would constitute violation of the Act. No

such complaint was made or pursued by the employer. Further, in the evidence offered by the employer there was never more than a hint that part of its reason for investigation was concern that McKellar was organizing during working hours. In any event, there was no evidence that the employer had issued a rule prohibiting discussion of the union during working hours. And, despite the fact that the employer apparently believed that McKellar was campaigning for the union during the late night working hours when no manager was present, there was no evidence to support that belief. Although Campbell and Markle hinted at this belief in the July 26 meeting with McKellar (asking her to focus on what happened in the store in the hours before midnight when no managers were present), it was not offered as grounds for removal of McKellar from the workplace or reassignment to another shift.

- 58. As I describe in greater detail below in dealing with the application of section 9.2, it is also noteworthy that the employer never explained McKellar's removal to other employees.
- 59. In all of the circumstances, the removal of McKellar from the workplace was analogous to a suspension or dismissal in midst of an organizing drive. And with no further investigation undertaken during her removal, the three week suspension was arbitrary. The employer failed to provide cogent reasons for its determination that it needed to remove McKellar from the workplace, and the process it undertook in her case was discriminatory and arbitrary in its variance from Shoppers Drug Mart usual' processes. In the circumstances, I find that the employer has failed to establish that its action was entirely free of anti-union motivation. The responding party therefore violated sections 65 and 67 of the Act.
- I also find that the employer's reassignment of McKellar upon return to work was not entirely free of anti-union motivation and that the responding party violated sections 65, 67 and 71 of the Act. Even if the removal of McKellar's minor supervisory duties and the key to the store cannot be characterized as a demotion, it was employer action taken in response to McKellar's recent interactions with other employees. The employer purportedly took these actions to rectify the problems caused by perceived harassment. Yet, the only harassment that the employer specifically identified as problematic related to McKellar's union activities. The same is true of her reassignment to a unique day shift. Even if the employer acted according to its belief that McKellar had always wanted day shift work, it offered little reason for the creation of an unusual shift that would be unique to McKellar. At the same time, the new shift would remove any chance for McKellar to interact with employees at the starts and ends of the usual shifts.
- 61. The union also alleges that the employer violated the Act on June 29 when Mandel attempted to discuss the union with McKellar. For the purposes of considering the union's argument, I have accepted McKellar's version of what occurred on that day. I have also considered the context in which the conversation occurred. Mandel had been aware of the union organizing campaign for some time, but the evidence does not establish that he was then aware that McKellar was the sole organizer. An anti-union petition had been circulated, but Mandel was unaware of it. Although Mandel invited McKellar to talk about the union, she declined. And while McKellar believes that Mandel's other comments were meant to suggest that he could compel her to talk about anything, including the union, she nonetheless managed to avoid any discussion of the union. Because Mandel said nothing further about the union, it is not obvious to me that he intended to interfere in McKellar's exercise of statutory rights. I do not conclude that Mandel's actions in this incident show anti-union motive. I find no violation of the Act with respect to this isolated incident.
- 62. However, I find that the various steps to increase managerial presence in the workplace during the organizing campaign, especially in the late hours before store closing, were further

employer actions that were not free of anti-union motive. Although the employer states that part of these moves were in response to employee concerns, I cannot disregard the coincidence of increased management presence and the union campaign. The employee survey was taken in January; the first change occurred in May or June when the union campaign was under way, and further change occurred upon McKellar's return to work in late August. Moreover, one of the persons seen more regularly was Mitch Danker whose primary role was to advise in respect of the union campaign. Finally, it is clear from the evidence that the employer believed that McKellar was organizing during working hours late at night when there traditionally had been no manager present, and it was in this time slot that the employer increased its managerial presence. In the circumstances, I conclude that something other than legitimate business rationale explains the increased managerial presence. I find that these actions were not entirely free of anti-union motive and therefore that the employer violated section 71 of the Act in these actions.

III. Certification pursuant to section 9.2

- Having determined that the employer violated the Act, the remaining issue is whether the remedies should include certification pursuant to section 9.2. It provides:
 - 9.2 If the Board considers that the true wishes of the employees of an employer or a member of an employers' organization respecting representation by a trade union are not likely to be ascertained because the employer, employers' organization or a person acting on behalf of either has contravened this Act, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.
- In the applicant's submission, the Board has granted certification pursuant to section 9.2 where the employer has dismissed the inside organizer, or where there is a pattern of unfair labour practices. Counsel for the applicant argues that both conditions exist in this case. In the applicant's submission, McKellar's suspension had the same effect as a dismissal. The responding party contends that there was no contravention of the Act and that there is no reason to find that the true wishes of employees respecting union representation cannot be ascertained. In its view, the union's organizing campaign simply stalled short of its goal and the union was trying to get through section 9.2 what it could not get through the normal certification processes. Further, the responding party argues that there was not substantial support for the union.
- 65. In *CMP Group (1985) Ltd.* [1993] OLRB Rep. Dec. 1247, the Board described the test that it applies under section 9.2:
 - 43. A contravention of the Act is a necessary but insufficient condition precedent to the exercise of the Board's power under section 9.2. We must now determine whether the employer's contraventions are of such a nature that the true wishes of employees respecting trade union representation are not likely to be ascertained . If it is determined that such wishes are not likely to be ascertained, the Board may exercise its discretion to certify the applicant. We should note that, as a result of recent amendments to the Act, the Board (as it was under the former section 8) is no longer directed to determine whether the applicant has membership support adequate for the purposes of collective bargaining as a condition precedent to the exercise of the Board's jurisdiction under section 9.2. Consequently, it was not suggested that the applicant's admittedly meagre membership support in this case was a bar to certification under section 9.2.
- 66. In this case, having considered the nature of the employer's violations of the Act as well as all of the other circumstances, I find that the true wishes of employees are unlikely to be ascertained and that this is an appropriate case for certification under section 9.2.
- 67. A pattern of increasing employer interference in the campaign can be traced. Throughout the period, Mandel relied on the advice of the resource staff of Shoppers Drug Mart head

office. It appears that the employer concluded that McKellar was conducting organizing efforts in the hours after 9:00 p.m. when managers were not present in the store. The employer changed its practice in managerial assignment in May or June when McKellar noticed that head office personnel were in the store until 11:30 p.m. One of the head office persons was Mitch Danker, whose primary responsibility was to assist Mandel in dealing with the union campaign. At about the same time, in late May and early June, an anti-union petition was circulated. (There was no suggestion of employer involvement in the petitions.) Although McKellar had found some success in her efforts prior to May 18, she now felt discouraged. In July, she regrouped and renewed her efforts, and signed a significant number of cards. After a particularly successful 3-shift effort (July 24-26), the employer suspended her from work. The employer had just received information that allowed it to identify McKellar as the inside organizer for the union and that disclosed that McKellar was telling employees that the union was near to obtaining support of a majority of employees. In confronting McKellar with allegations of harassment, the only particular example to which the employer referred was her union organizing efforts.

- What was the likely reaction of employees to the removal of McKellar from the work-68. place? As Mandel put it, the matter was dealt with "very quietly". In all of the circumstances, I find it probable that employees were unaware of the details of McKellar's removal from the workplace. The employer certainly did not offer details. Employees could not be expected to know the employer's actual or operative reasons for removing McKellar. Nor could they be expected to know whether she had been suspended, with or without pay, or dismissed. Even if they had reason to believe she was being sent home "for just a couple of days" with pay in order to allow for an investigation, they could not be expected to know why the delay stretched into weeks (and there was no evidence that any explanation for the delay was provided to any employee). It is not surprising that McKellar says that one employee thought she had been dismissed. While I am not in a position to conclude whether employees believed that McKellar had been dismissed, I am able to find that it is probable that most or all employees knew that McKellar was the sole inside organizer for the union. Indeed, some employees had offered that information to their employer as part of their statements regarding harassment. In the circumstances, I find that McKellar's removal had the same chilling effect that her dismissal would have had upon the organizing campaign.
- 69. Like her removal from the workplace in the midst of a successful stretch of organizing, the conditions imposed on her return to work sent the message that the employer would react severely to union activity. Employees were likely to conclude that the employer's position was that encouragement of fellow employees to join the union constituted disciplinable "harassment" that could lead to a shift change, loss of responsibilities, and that if pursued would lead to discharge. At the same time, the employer increased assignment of managers during all store hours until closing. In all of the circumstances, this was a further message that the employer would not tolerate employees encouraging support for the union.
- Counsel for the responding party argued that the Board could find that the union's campaign had reached its zenith, and that the campaign stalled because of lack of employee interest rather than the employer's actions. As the Board has noted in other cases where the employer has pressed the same argument, the problem for the Board is that it cannot now assess whether the union had already obtained all the support that it would have received in any event before the unfair labour practices began. The Board cannot now assess what the true wishes of employees with respect to union representation would have been prior to contravention of the Act. As the Board put it in *Beaver Lumber*, [1992] OLRB Rep. May 553, at paragraph 39: "Whatever doubt we may now have concerning employees' appetite for collective bargaining arises because we are now unable to assess their true wishes free of the effects of the improper interference by the

respondent. This is the type of situation that section 8 was designed to remedy [as was its successor provision section 9.2].

- I am not persuaded that any remedy provided by the Board can result in a voluntary expression of the true wishes of employees with regard to union representation. The employer's violations of the Act included a clear message that union support would affect job security. The true wishes of employees with respect to union representation would not likely be ascertained even by means of a representation vote at this point. Employees would vote not on whether they wish to be unionized but, rather, on whether they wanted job security. (Again, see the Beaver Lumber decision.)
- For all of these reasons, the Board issued the bottom-line decision that found violations of the Act, ordered reassignment of McKellar to her former work schedule, and ordered issuance of a certificate to the applicant.

The Employer Request for Reconsideration

- In its request for reconsideration of the Board's decision dated November 10, 1995, the 73. responding party requests the following relief:
 - (1) that the decision be struck down as null and void;
 - (2) that the certificate be quashed;
 - (3) that the Board reconvene to hear argument on the evidence with respect to the application of section 11(1) of the new Act;
 - (4) in the alternative, that the issuance of the certificate be stayed pending an opportunity for the responding party to make an application for judicial review of the Board's decision;
 - (5) that the Board conduct a hearing to permit oral submissions on the issues set out in the request for reconsideration.
- The responding party offered the following submissions in support of its request: 74.

- Bill 7 received Royal Assent on November 10, 1995.
- 5. Subsection 3(1) of the new Act, as set out above clearly indicates that the section applies with respect to proceedings commenced under the old Act which a final decision has not been issued on the day which the section comes into force (emphasis added).
- Clearly a final decision had not been issued before the coming into force of the new Act. Therefore, clearly, the new Act should have been applied.
- Given that there have been substantial changes to the Act with respect to certification where the Act has been contravened, now section 11 of the new Act, the Board has not applied the proper statutory scheme in weighing the evidence before it and rendering its decision.
- As the Board has not applied the Act in force at the time of the decision, the decision is null and void.

- The decision of the Board is not a final decision in that no reasons have been provided
- 10. As the Board has, to date only issued a "bottom line decision" and has indicated that reasons will follow at a later date, the responding party reserves its right to respond to such reasons should it deem it necessary to do so.
- 75. For the responding party, the point is to open opportunity for argument under section 11(1) of the new Act. Section 11(1)-(3) of the new Act replaced section 9.2 of the old Act. The relevant portions provide as follows:
 - 11. (1) Upon the application of a trade union, the Board may certify the trade union as the bargaining agent for the employees in a bargaining unit in the following circumstances:
 - 1. An employer, employers' organization or person acting on behalf of an employer or employers' organization has contravened the Act.
 - 2. The result of the contravention is that a representation vote does not or would not likely reflect the true wishes of the employees in the bargaining unit about being represented by the trade union.
 - 3. No other remedy, including the taking of another representation vote, is sufficient to counter the effects of the contravention.
 - 4. The trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board to be appropriate for collective bargaining.

. . . .

(3) The Board may consider the results of a representation vote when making a decision under this section.

The unfair labour practice provisions relied upon by the applicant (section 65, 67 and 71 of the old Act) remain unchanged (now sections 70, 72 and 76 of the new Act).

- 76. The Labour Relations and Employment Statute Law Amendment Act, 1995 (or "Bill 7") repealed the old Labour Relations Act and replaced it with the Labour Relations Act, 1995. Amongst other measures, Bill 7 contained certain transitional provisions that govern proceedings affected by the change in law. In the transitional provisions, section 3 states, in part, as follows:
 - 3.- (1) This section applies with respect to proceedings which commenced under the old Act in which a final decision has not been issued on the day on which this section comes into force.
 - (2) A proceeding continuing after the new Act comes into force shall be decided as if the new Act had been in force at all material times. The presiding person or body shall apply the substantive provisions of the new Act as well as the procedural rules established under it.
 - (3) Despite subsection (2), in a proceeding relating to an application for certification of a trade union as a bargaining agent, the presiding person or body shall apply sections 5, 8, 9 and 9.1 of the old Act and not section 7, 8 and 10 of the new Act. This subsection applies only with respect to applications for certification made before October 4, 1995.
- 77. Section 86 of Bill 7 provided that the new Act came into force on the day it received Royal Assent. As noted by the responding party, the Act received Royal Assent on November 10, 1995. The Board issued its bottom-line decision on November 10, 1995.

- 78. Is the November 10, 1995 decision a "final decision" for the purposes of Bill 7's transitional provisions?
- 79. The responding party argues that the November 10, 1995 decision is not final because reasons were not to be provided until a later date. Impliedly, the responding party would have the Board treat the case as "a proceeding continuing after the new Act [came] into force" and, therefore, one to which the new Act's provisions would apply as contemplated by subsection 3(2) of Bill 7's transitional provisions.
- 80. The absence of reasons at the time of issuance of a bottom-line decision does not undermine the dispositive effect of the decision. When a decision finally determines the central issue between the parties or finally determines one of the parties' substantive rights, it must be considered a "final decision". (See the unreported decision of the Board dated January 5, 1996 in *Dryden District Roman Catholic Separate School Board*, Board File No. 2688-95-R, concerning what constitutes a "final decision for the purposes of Bill 7's transitional provisions.) That is precisely the effect of the November 10, 1995 decision of the Board. The decision determined finally that the responding party had violated the Act and that a certain remedy flowed. It determined finally that the true wishes of employees were unlikely to be ascertained. It determined finally the description of an appropriate bargaining unit and that a certificate would issue to the applicant. (See *Royalguard Vinyl Co.* [1994] OLRB Rep. June 775 for a discussion of the nature and purpose of bottom-line decisions that dispose of cases with reasons to follow. And see section 17 of the *Statutory Powers Procedure Act* which distinguishes the requirement to issue written "final decisions" from the requirement to issue written "reasons" if requested by a party.)
- 81. Accordingly, these are proceedings commenced under the old Act in which a final decision issued on November 10, 1995.
- 82. The remaining issue is whether these are proceedings in which a final decision had not been issued on the day on which Bill 7 came into force. The responding party suggests that the question to be asked is whether a final decision had been issued "before the coming into force of the new Act". However, that is not what the statute says. On a plain reading of the provision, section 3(1) requires the Board to answer this question: had a final decision been issued on November 10, 1995? In this case, the answer is "yes".
- Accordingly, the Board rejects the responding party's contention that section 11(1) of the new Act should have applied to this matter rather than section 9.2 of the old Act. I would comment that, despite differences in the old and new provisions, it is not clear to me that the result in this case would have differed in the event of the application of new section 11(1). That new provision is not the same as what was once section 8, the unfair labour practice certification' provision that existed before Bill 40 created section 9.2. Although the new Act's section 11(1) requires the Board to consider the adequacy of support for the union amongst employees, it does not require the Board to consider the results of a representation vote (or even to conduct such a vote) in that regard. Furthermore, I note that the level of support for the union that was disclosed in the instant case may well have been sufficient to find "adequate support" in the terms of either pre-Bill 40 section 8 or the new Act's section 11.
- 84. As for the request to stay the issuance of the certificate pending application for judicial review, I see no reason that matters should be stayed in the face of a pending application in the courts. Here, a stay would not merely preserve the *status quo*; it would cause deterioration in the position of one of the parties. See *EKT Industries Inc.*, [1987] OLRB Rep. May 696 and *Royalguard*, *supra*.

85. For these reasons, the Board denies the request for reconsideration and the various requests for other relief made by the responding party.

0869-95-R Teamsters, Chauffeurs, Warehousemen and Helpers, Local 880, Applicant v. **Tilbury Concrete Transport Inc.** and Tilbury Concrete Inc., Responding Parties v. Canadian Union of Operating Engineers and General Workers, Intervenor

Related Employer - Remedies - Teamsters certified to represent drivers employed by Company "A" in January 1995 - CUOE certified to represent drivers of Company "B" in April 1995 - Company "B" employing drivers for first time in March or April - Teamsters asserting and Board finding that Companies "A" and "B" related employers - CUOE filing intervention but not otherwise participating in proceeding or defending its bargaining rights - Board declaring Companies "A" and "B" to be related employers and that CUOE no longer representing employees of Company "B"

BEFORE: Jerry Kovacs, Vice-Chair, and Board Members W. N. Fraser and G. McMenemy.

APPEARANCES: Michael Klug and Frank Biekx for the applicant; Albert Chodola, Steven Bezaire and Ernie Mailloux for the responding party Tilbury Concrete Inc.; Albert Chodola, Steven Bezaire and Larry Mailloux for the responding party Tilbury Concrete Transport Inc.; Sean Clancy for the intervenor.

DECISION OF THE BOARD; April 3, 1996

- 1. In this application under subsection 1(4) of the *Labour Relations Act*, Teamsters, Chauffeurs, Warehousemen and Helpers, Local 880 (hereinafter referred to as "the Teamsters" seeks a declaration that Tilbury Concrete Transport Inc. (hereinafter referred to as "Tilbury Transport") and Tilbury Concrete Inc. (hereinafter referred to as "Tilbury Concrete") constitute a single employer for the purposes of the Act.
- 2. Pursuant to a certificate issued on January 31, 1995, the Teamsters represent truck drivers employed by Tilbury Transport. The Canadian Union of Operating Engineers and General Workers (hereinafter referred to as "the CUOE") represents employees of the other responding party, Tilbury Concrete, pursuant to a certificate issued on April 21, 1995. Tilbury Concrete began to employ truck drivers, for the first time in its corporate history, in late March or early April, 1995. It reached a collective agreement with the CUOE in April or May of 1995.
- 3. Upon learning that the CUOE had obtained bargaining rights in respect of the new truck drivers at Tilbury Concrete, the Teamsters filed this application. The CUOE filed an intervention, taking the position that the Teamsters' application was "untimely and inappropriate.
- 4. Despite having filed an intervention, the CUOE did not participate further in the proceedings. Nonetheless, the CUOE occupies a critical place in the facts of the case.

Our Conclusions

- 5. Are the responding parties entities that are under common control or direction and that carry on associated or related activities? For reasons expressed below, we find that they are.
- 6. Should the Board exercise its discretion to make the declaration contemplated by section 1(4) of the Act? Although the conditions exist for a finding of relatedness, a declaration would disturb existing CUOE bargaining rights. Nonetheless, the CUOE has failed to defend its bargaining rights, effectively abandoning them. It does not rest with an employer to defend the bargaining rights of the employees' bargaining agent. In all of the circumstances of this case, the Board finds it appropriate to exercise its discretion to declare that the responding parties constitute a single employer for the purposes of the Act. The declaration is effective as of the date that the responding parties became related employers. Since that date pre-dates the CUOE's certification as bargaining agent, the Teamsters' bargaining rights prevail. In the circumstances, it is unnecessary for the Board to determine whether there was employer support for the CUOE.

Background Facts

- The responding parties are parts of a family enterprise that began in 1977 when Ernie Mailloux started operation of a ready mix concrete business under the name of Tilbury Concrete Limited. He operated a batching plant in Tilbury from that time until 1982. In that year the business went bankrupt and a bank seized the assets of the company. Those assets, and the business itself, were purchased by the numbered company 507822 Ontario Inc. (hereinafter referred to as "507822"), then owned by Ernie Mailloux's friend, Andre Lanoue. By the end of 1983, Ernie Mailloux had purchased 507822 and once again became the owner of the business. Although he abandoned the corporate entity known as Tilbury Concrete Limited, he maintained 507822 as the vehicle to carry on the business of "Tilbury Concrete". The business prospered and expanded to include a substantial transportation division, with several trucks and drivers delivering concrete mostly in the Tilbury area. 507822 was not named as a responding party in these proceedings.
- 8. Ernie Mailloux's family has always participated in the business. His brother worked with him until 1992 when he left to start his own company. Ernie Mailloux's wife, Linda Mailloux, is a director of 507822, although she plays no active role in the management of the business. In addition, Ernie Mailloux's children, Larry, Mary Jane and Nicole, have had increasingly larger business roles over recent years. Both Larry and Mary Jane have worked in the business for a considerable length of time. The children's part in the business changed formally when Ernie Mailloux substantially restructured his business in 1992.
- 9. As Ernie Mailloux described, part of the reason for the change in structure was to permit Larry Mailloux "to do something on his own...to be his own boss". Ernie Mailloux broke his company, 507822, into two parts Tilbury Concrete and Tilbury Transport. These were two new corporate entities formed in 1992. Tilbury Concrete's directors were Ernie Mailloux and his wife Linda, and this company purchased the batching plant and all of the hard assets associated with it. Ernie Mailloux testified that Tilbury Transport was formed for his three children, who became the three directors as well as shareholders (Larry had a controlling number of shares and the shares of the youngest, Nicole, were held in trust by her mother). Tilbury Transport bought the transportation division from 507822. 507822 retained an interest in both companies, as a significant shareholder. The parties spent considerable time arguing about the nature of the shares and the degree of control that such share ownership gave 507822 (i.e., Ernie Mailloux) over the children's business. However, it was not disputed that 507822 loaned most or all of the money necessary for the purchase and gained shares in exchange. Similarly, 507822 loaned the money for the purchase of

Tilbury Concrete by Ernie and Linda Mailloux. Ernie Mailloux remains the sole shareholder of 507822.

- 10. Under this new arrangement, the truck drivers became employees of Tilbury Transport rather than of 507822. Tilbury Transport's main business was the delivery of concrete produced by Tilbury Concrete. Tilbury Concrete did not keep trucks or employ truck drivers, concentrating instead on the operation of the batching plant.
- The business picture changed again in September of 1994 with the opening of a new batching plant in Windsor, owned by 1078303 Ontario Inc. (hereinafter referred to as "the Windsor plant"; like 507822, it was not named as a responding party in these proceedings). Although that numbered company is owned by Linda Mailloux alone, she plays no role in the daily management of the business. The opening of the Windsor plant caused changes for both Tilbury Transport and Tilbury Concrete. Tilbury Transport's main business had been delivery of concrete from Tilbury Concrete's plant to customers in the Tilbury area. Larry Mailloux and his company were situated in Tilbury in the same office as Tilbury Concrete, and drivers were dispatched out of that location. After the Windsor plant opened, Tilbury Transport's main business became delivery of concrete for the Windsor plant. Larry Mailloux now spends the great majority of his time at the Windsor plant and his company's trucks and drivers are stationed at the Windsor plant.
- 12. With its trucks stationed at Windsor, Tilbury Transport was no longer as readily available to service Tilbury Concrete and its customers in the Tilbury area. In the latter part of 1994, Ernie Mailloux suggested to his son that Tilbury Transport needed to acquire more trucks if it wished to continue to handle the majority of loads for Tilbury Concrete in Tilbury. Both men knew that Tilbury Transport was not in a financial position to acquire more trucks. Ernie Mailloux then told his son that he planned to order trucks for Tilbury Concrete. This sequence of events was confirmed by the testimony of Rob Leclerc, a Tilbury Transport driver who was called by the Teamsters as a witness in the hearing of this matter. Leclerc learned in November or December of 1994 that there was an order for new trucks because he was assigned to drive a new truck back to the vendor; at the time, he assumed that it was Tilbury Transport rather than Tilbury Concrete that was adding a truck to its business.
- 13. Despite any plans that it may have had to purchase trucks, Tilbury Concrete did not employ truck drivers in late 1994 or early 1995. And the evidence does not suggest that the drivers employed by Tilbury Transport knew or ought to have known that Tilbury Concrete would employ its own drivers later in 1995. When Rob Leclerc was assigned to return a new truck in late 1994, he believed that the truck was being purchased by Tilbury Transport. That was not an unreasonable conclusion, given the fact that Tilbury Concrete owned no trucks at the time and that Tilbury Transport the former trucking division of Ernie Mailloux's business was the sole trucking part of the family enterprise. Moreover, because Ernie Mailloux was responsible for most, if not all, of the financing of his son's purchase of the trucking division, it might not be unreasonable to assume that the two men might have discussed whether Ernie Mailloux or 507822 should lend more money to Tilbury Transport to allow it to acquire more trucks. However, that possibility was not explored in the hearing and is not obvious on the facts before us.
- This was the state of affairs at the start of 1995 when the Teamsters conducted their organizing campaign and filed application for certification as bargaining agent for the drivers of Tilbury Transport. According to Frank Biekx, the union's business agent, the drivers were not certain of the precise name of their employer. This was not because they were aware that different corporate entities existed. It was because their pay-cheques and other company documents simply bore the words "Tilbury Concrete" (i.e., the short form of business name that Ernie Mailloux has

used for all corporate vehicles). Through the certification process the union learned the proper name of the drivers' employer, and a certificate issued in respect of Tilbury Transport. Its geographic scope covered the Counties of Essex and Kent, which include both Tilbury and Windsor. Frank Biekx testified that the union did not know and was not informed of the existence of the other corporate entity (i.e., Tilbury Concrete Inc.). As Biekx commented, that fact would probably not have mattered to the union because Tilbury Concrete did not employ truck drivers and the union would have had no reason to believe that it ever would employ truck drivers. Tilbury Transport appeared to be the only one of the family companies that would operate a trucking business.

Biekx says that the Teamsters first heard rumour of the existence of another corporation during other litigation before the Board, also involving the concrete industry, in the spring of 1995. The Teamsters soon learned that the Board had certified the CUOE on April 21, 1995 as bargaining agent for all employees of Tilbury Concrete in the Counties of Essex and Kent. (Under cross-examination, Ernie Mailloux answered that the two Tilbury Concrete drivers who became the CUOE unit happened to be his brother-in-law and his friend. As discussed in greater length below, the Teamsters asked the Board to infer that there was employer support for the CUOE.) Neither the CUOE nor Tilbury Concrete named the Teamsters as a party interested in their proceedings. The Teamsters therefore had no notice of those certification proceedings. On May 29, 1995, the Teamsters filed the instant application for a declaration that Tilbury Transport and Tilbury Concrete are related employers. On July 11, 1995, an intervention was filed in the name of the CUOE by Nick Sajatovich (from a Windsor address). The intervenor asserted that the CUOE had entered into a collective agreement with Tilbury Concrete effective May 15, 1995 and that the Teamsters' application was "untimely and inappropriate".

Relatedness of the Responding Parties

- 16. In addition to the facts outlined above, other evidence disclosed significant overlap in the operations of Tilbury Transport, Tilbury Concrete and the Windsor plant. Tilbury Transport uses office space at Tilbury Concrete's plant in Tilbury; Tilbury Transport owns no office equipment and there was no evidence that either charges the other anything for that space. Larry's sister, Mary Jane (one of Tilbury Transport's directors) works for Tilbury Transport at that office, handling paperwork and dispatching the drivers. Jane Haskell, an employee of Tilbury Concrete works in that same office. She is the bookkeeper for both Tilbury Concrete and the Windsor plant, and she does occasional work for Tilbury Transport when there is an overload of paperwork. In addition, she processes some benefit forms for Tilbury Transport drivers. Ernie Mailloux describes himself as the manager at Tilbury, where he spends most of his work time. He stated that he manages Jane Haskell, the 2 Tilbury Concrete drivers, and Mary Jane. Both Ernie Mailloux and Mary Jane dispatch the Tilbury Concrete drivers. Similarly, although Ernie does most of the batching at the Tilbury Concrete plant, Mary Jane occasionally does that work.
- 17. Both Ernie Mailloux and Larry Mailloux acknowledged that Linda Mailloux did not manage the Windsor plant. Since the opening of the plant, Larry Mailloux has stationed his trucks there and spends most of his time there. Although he does not claim to manage the Windsor plant, it was not clear who otherwise had that authority. Larry Mailloux suggested that Kevin King, the batcher, ran the Windsor plant, but then admitted that he has authority to give directions to Kevin King. He further admitted that he supervises the operator of the front-end loader. Larry Mailloux also occasionally operates the front-end loader and does batching. And when Tilbury Concrete dispatches its drivers on occasion to Windsor, Larry Mailloux dispatches them from the Windsor plant to the customer.
- 18. With respect to the drivers employed by Tilbury Transport, Larry Mailloux explained

that he dispatches them, devises their work schedules, and signs their pay-cheques. Although he takes responsibility for discipline of his employees, he admits that his father occasionally speaks to his employees about employment-related matters. Rob Leclerc, a Tilbury Transport driver, testified that Ernie Mailloux called him into his office to discuss absenteeism. He said also that Mary Jane once informed him that Ernie Mailloux had approved a vacation request that Larry Mailloux had earlier denied. Another Tilbury Transport driver, Jerome Lanoue (called by the responding parties) said that drivers talked to Larry about things like vacation requests, but that Jane Haskell (the Tilbury Concrete bookkeeper) processed vacation pay. He also noted that it was not unusual for Ernie to give directions to the Tilbury Transport drivers.

- A number of other factors show the inter-relationship between the operations of father and son. As already noted, Tilbury Transport's purchase of the trucking division of 507822 depended on the loan that 507822 (controlled by the father) provided to Tilbury Transport. Larry Mailloux may not have been in a position to describe the nature of the shares that 507822 holds, nor to answer whether Tilbury Transport had ever paid dividends to 507822. However, there was no doubt in his mind that his father's company had loaned the money necessary to start Tilbury Transport. He knew that he makes annual payments (or repayments) of some sort to 507822 or his father, but he did not have an idea of what those amounts had been. Beyond financial support, Ernie Mailloux provides other business support to his son (as his son no doubt provides support to him). Prior to the opening of the Windsor plant, Tilbury Transport almost exclusively served Tilbury Concrete. Now Tilbury Transport almost exclusively serves the Windsor and Tilbury plants. Although Larry Mailloux spends the great majority of his time serving the Windsor plant, he still speaks to his father on business matters on a daily basis. His father recommended legal counsel, and the two shared the same counsel in these proceedings. Most significantly, Ernie Mailloux has acted, free of charge, as the sole representative of Tilbury Transport in collective bargaining with the Teamsters.
- 20. In our view, the conditions necessary for a declaration under subsection 1(4) of the Act are clearly present. The subsection provides as follows:
 - 1. (4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.
- 21. The purpose of the related employer provision was described by the Board in *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 at paragraph 12:
 - ... Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 [now section 69] which preserves the established bargaining rights and collective agreement when a "business" is transferred from one employer to another...
- 22. Before the Board may consider the exercise of its discretion to declare that certain entities constitute one employer for the purposes of the Act, three conditions must be satisfied:

- (i) there must be more than one entity involved;
- (ii) the entities must be engaged in associated or related activities;
- (iii) the entities must be under common control or direction.
- There was no dispute that this case involves more than one entity. Only two of the entities, Tilbury Transport and Tilbury Concrete, were named as responding parties. Counsel for the responding parties argued that the Board's analysis of the relatedness of the two responding parties could not take into account any of the facts regarding the other Mailloux family businesses, i.e., 507822 and the Windsor plant. We see no reason why our consideration of the relatedness of the two responding parties should ignore facts regarding other unnamed entities. Of course, the Board recognizes that any eventual declaration that it might make could not name an entity that are not party to the proceeding. The applicant also recognized this principle and for that reason made a mid-hearing attempt to amend its pleadings to add 507822 as a responding party. Having regard to our view that the applicant could have discovered and named 507822 prior to the hearing, and noting the prejudice that would result to the responding party's case at that point in the hearing, the Board denied the motion. However, counsel for the responding parties failed to explain, and we have failed to discern, any reason why the configuration of parties to a proceeding must limit the relevance of evidence in a proceeding.
- 24. In this case, an analysis of the nature of the activities or businesses and the control or direction of the responding parties leads inevitably to the web of evidence regarding the Mailloux family businesses. The obvious ties between all of the entities means that the evidence is relevant to our determination of the relatedness of the named responding parties.
- Counsel for the responding parties argued that Tilbury Transport and Tilbury Concrete did not carry on associated or related activities. The former is a trucking business and the latter is a concrete manufacturing and construction business. Counsel acknowledged that Tilbury Concrete is now also in the trucking business (and that this is the reason the Teamsters brought this application), but argued that the timing of this activity somehow affects determination of relatedness. This is not so. In *Brant Erecting and Hoisting, supra*, the Board commented on the effect of the legislative amendment that added the phrase "whether or not simultaneously" to subsection 1(4):

... Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase "whether or not simultaneously". The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicle through which the activity is carried on will not operate simultaneously; and, business may be effectively transferred from one corporate entity to another, without any of the indicia of a "transfer of a business" which might trigger the application of section [63]. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required after it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of business between related businesses without any apparent disposition of assets, inventory, trade, names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. ...

The amendment extends the ambit of section 1(4) to situations in which one business entity is actively carrying on business and the other is not. It is not necessary to have shared participation

in a common business endeavour or even contemporaneous economic activity. The relationship between the business entities is a functional rather than a temporal one. Businesses or activities are "related" or "associated" because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, two businesses may be "related" within the meaning of section 1(4) even though their activities are carried on through different corporate vehicles and are not carried on simultaneously. It is evident that the Legislature has created a regime of collective bargaining law which significantly modifies the common law notions of "privity of contract" or "the corporate veil". ...

In the same decision, the Board commented on the meaning of the phrase "associated or related activities or businesses" at paragraph 15:

... It is not necessary to have shared participation in a common business endeavour or even contemporaneous economic activity. The relationship between the business activities is a functional rather than a temporal one. Businesses or activities are "related" or "associated" because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, the businesses may be "related" within the meaning of section 1(4) even if their activities are carried on through different corporate vehicles and are not carried on simultaneously. It is evident that the Legislature had created a regime of collective bargaining which significantly modifies the common law notions of "privity of contract" or "the corporate veil".

- The point of the applicant's case is to enforce a statutory right to protection of bargaining rights that attach to a "definable commercial activity". Here, the definable commercial activity is the trucking division of the Mailloux family enterprise. The applicant's sole concern is that part of the activity or business. When the Teamsters obtained bargaining rights, Tilbury Transport was the only part of the family enterprise that carried on trucking business. Tilbury Concrete now carries on trucking business as well. It commenced that activity to serve the very same market that Tilbury Transport serves the batching plants owned within the Mailloux family. In particular, it delivers loads in the Tilbury area that Tilbury Transport once exclusively delivered. Tilbury Transport still occasionally delivers such loads but is now almost wholly dependent on the Windsor plant.
- 27. As for the third criterion of relatedness, we find that the two responding parties are under common control or direction within the meaning of the *Labour Relations Act*. Whatever the purpose of corporate structure or commercial form of the entities, the businesses are under common control from a labour relations perspective.
- 28. The two responding parties (and, indeed, all of the entities involved) stem from the original business developed by Ernie Mailloux. It was Ernie Mailloux's decision to split his enterprise into two entities in 1992, and it was his decision to pass on the trucking division of his business to his children. Through 507822, Ernie Mailloux provided most or all of the financial support that was necessary for the purchase of the business. Although Larry Mailloux is obviously capable and responsible, and while he may eventually control the business(es) to a greater degree, his father still plays a critical role in determining his business. Tilbury Transport has always been almost entirely dependent on the Mailloux family batching plants. While Linda Mailloux owns the Windsor plant according to corporate form, there is no doubt that Larry and Ernie Mailloux control and direct that plant in substance. The responding parties are parts of a family enterprise which is represented to the public as a single, integrated business. Despite small differences, the logos on the trucks and on the billing documents of Tilbury Transport and Tilbury Concrete are as obviously similar as the very names of the companies. Further, all of the family enterprises advertise together (in the yellow pages of the phone directory) under the name of "Tilbury Concrete".

Finally, Ernie Mailloux plays some role in the daily direction of workforces of both responding parties, and the takes the lead if not sole role in negotiations with trade unions.

29. For all of these reasons, we find that the conditions exist for a declaration of relatedness. Further, the relatedness commenced at the time of the responding parties' incorporation in 1992.

Appropriateness of a Declaration

- 30. The responding parties argued that the Board should not exercise its discretion to make the declaration in the event that it found relatedness.
- Counsel for the responding parties suggested that the mischief contemplated by section 1(4) is not present in this case. Because the complement of drivers employed by Tilbury Transport has remained steady, counsel argued that there has been no erosion of bargaining rights. Counsel noted that the Teamsters still represent the same number of drivers that they represented at the time of certification, and posited that the union is merely avoiding certification proceedings in respect of the additional drivers employed by Tilbury Concrete. We reject the argument. As the Board has decided in earlier cases, erosion of bargaining rights can occur even without diminution of workforce complement or business volume (see *Kustom Insulation Ltd.*, [1979] OLRB Rep. June 531). In this case, Ernie Mailloux first pressed Larry Mailloux to expand the number of trucks and drivers in the Tilbury Transport workforce. Had that happened, those drivers would have fallen within the Teamsters' bargaining unit. Instead, the work was diverted to Tilbury Concrete which had never before employed truck drivers and which had been created in 1992 as a corporate entity for the batching plant as opposed to the trucking division of 507822. Accordingly, we find that the mischief contemplated by section 1(4) is present in this case.
- 32. The more compelling argument of the responding parties was that a related employer declaration would disturb the existing CUOE bargaining rights and collective agreement. As a corollary to that point, the responding parties noted that a declaration in favour of the Teamsters would interfere with the rights of Tilbury Concrete employees to select their own bargaining representative, the CUOE.
- April 21, 1995 ought to be revoked and that any collective agreement with the CUOE was null and void. In the Teamsters' submission, the CUOE application for certification was untimely because the Teamsters had bargaining rights for Tilbury Concrete employees. As the Teamsters acknowledged, this conclusion depends on a declaration by the Board that Tilbury Transport (in respect of whose employees the Teamsters had a certificate) and Tilbury Concrete were related employers as of the time of their incorporation, i.e., prior to either union's obtaining of bargaining rights. Citing sections 13 and 49 of the Act then in force (now sections 15 and 53 of the Act), the Teamsters took the further position that employer support of the CUOE should cause the Board to revoke the CUOE certificate and to treat the collective agreement with Tilbury Concrete as null and void.
- The Teamsters contended that Ernie and Larry Mailloux deliberately diverted trucking work to Tilbury Concrete in order to avoid the costs of paying drivers in a Teamsters' bargaining unit. Counsel submitted that circumstantial evidence points to the further conclusion that Ernie Mailloux supported the CUOE's organization of his two drivers. First, the drivers who supported the CUOE application for certification happen to be one friend and one relative of Ernie Mailloux. Second, the collective agreement between Tilbury Transport and the CUOE is dated *prior* to the date the Board issued a certificate to the CUOE. Even if that date was in error, counsel submitted that it is suspicious that Ernie Mailloux was willing to sign a collective agreement within days of

certification, given that he has bargained for months with the Teamsters on behalf of Tilbury Transport without concluding a collective agreement.

- 35. Counsel for the applicants urged the Board to draw negative inferences in respect of the failure of the CUOE to appear at the hearing to defend against the Teamsters' allegations. The responding parties point out that they have responded to those allegations and that nothing in the evidence (including cross-examination of Ernie Mailloux) discloses employer support for the CUOE or bad faith on Ernie Mailloux's part in the decision to hire drivers through Tilbury Concrete. Counsel for the responding parties further noted that the applicant did not bother to call the two Tilbury Concrete drivers as witnesses.
- 36. As for the CUOE itself, there was considerable confusion regarding its intervention and its position in respect of any of these issues. The intervention form filed with the Board named Nick Sajatovich as contact person and listed a Windsor address for the union. Although served with notice of the hearing (which was held in Windsor), neither Mr. Sajatovich nor anyone from the Windsor office appeared before the Board on any of three hearing dates. However, Sean Clancy attended before the Board on the first of the hearing dates and asserted that he was a representative of the CUOE based in the union's national office in Toronto. The responding parties challenged Mr. Clancy's authority to represent the intervenor in the absence of any proper notice from the intervenor that its representative would be Mr. Clancy rather than Mr. Sajatovich. Moreover, it appeared that an internal dispute within the CUOE put into issue the authority of Mr. Sajatovich to act on behalf of the CUOE. The CUOE national office was apparently unaware that Mr. Sajatovich had obtained bargaining rights in respect of Tilbury Concrete.
- None of these contentious matters regarding the CUOE intervention or its position with respect to issues before the Board required any determination by the Board. Mr. Clancy advised that, if permitted to make representations on behalf of the intervenor, he would advise the Board that the CUOE no longer wished to intervene. Mr. Sajatovich's failure to appear had the same effect; the Board treated the intervention as one which was not pursued. Taking that into account, Mr. Clancy withdrew from the hearing without seeking any decision by the Board on his right to speak on behalf of the intervenor in this case.
- 38. In the result, the CUOE has taken no position on the state of its bargaining rights in respect of Tilbury Concrete.
- 39. As counsel for the applicant so aptly put the point, this is a case where the declaration would have no purpose unless the Board were to disrupt the existing bargaining rights of the CUOE. The Teamsters seek a declaration that the responding parties were related as of their inception in 1992, such that the Teamsters bargaining rights with Tilbury Concrete would be retroactive to the date (January 31, 1995) on which they obtained bargaining rights in respect of Tilbury Transport. In that result, the CUOE certification application in April of 1995 would have been untimely and ought to have been dismissed by the Board.
- 40. In this case, therefore, the interests of the CUOE are a significant factor. In other cases where a related employer declaration would have created conflict with the established bargaining rights of another trade union, the Board has exercised its discretion and refused to issue the declaration. (See *Bayritz Construction Ltd.*, [1994] OLRB Rep. Oct. 1283 and the cases cited therein.) Despite its concern for the preservation of bargaining rights like those held by the Teamsters in this case, those rights are not inherently more important than the prejudicial consequences that would flow from the declaration.
- 41. Despite the consequences that would flow from a declaration in this case, the CUOE

has not defended its bargaining rights. Where the Board has refused to exercise its discretion to issue a related employer declaration because of another union's established bargaining rights, it has taken into account the other union's defence of its bargaining rights. Another union's intervention in the proceedings allows the Board to assess the labour relations conflict that would result from issuance of a declaration. In this case, the CUOE did pursue a defence of its interests. Mr. Sajatovich failed to appear on the hearing dates. To the extent that Mr. Clancy claimed to represent the CUOE, he would have advised the Board that the CUOE was abandoning its intervention. Finally, no affected employee made any representation to the Board.

- 42. In the circumstances of this case, we see no reason to give primary consideration to the prejudicial consequences that a declaration would cause to the CUOE. Therefore, the existence of the CUOE's bargaining rights is not sufficient reason for the Board to decline to issue the declaration.
- 43. The responding parties' further argued that a declaration should not issue because the Teamsters delayed unduly in making this application. We reject that argument. At the time the Teamsters obtained bargaining rights, the union had no reason to believe that it was dealing with a multi-entity situation. Indeed, this is a family enterprise that holds itself out simply as "Tilbury Concrete" to the public and to its employees (or at least to the Tilbury Transport drivers who signed Teamsters' union cards). Further, Ernie Mailloux acted as employer negotiator in Tilbury Transport's collective bargaining with the Teamsters. The union discovered the multi-entity reality only after the CUOE had already obtained bargaining rights and quickly signed a collective agreement with the employer. The instant application followed in short order. For these same reasons, we do not find that this is a case where the union left its bargaining rights exposed through delay in a clear multi-entity situation. (See Industrial Mine Installations Ltd., [1972] OLRB Rep. Dec. 1029.) In any event, the Board is not inclined to refuse to make a declaration simply because of an applicant's delay. The Board focuses on whether any actual prejudice that is not inherent in the declaration itself would flow from the delay. (See KNK Limited, [1991] OLRB Rep. Feb. 209). In this case, we have considered and disposed of the concern of actual prejudice, i.e., the displacement of CUOE bargaining rights.
- For these reasons, we find that this is an appropriate case for the Board to exercise its discretion and to issue a declaration under section 1(4).
- In the circumstances, we find it unnecessary to conclude whether the circumstantial evidence before us leads to a finding that CUOE certification and collective agreement were employer-supported. We would observe, however, that it appears that the CUOE collective agreement was negotiated and signed prior to the issuance of the Board's certificate. Nonetheless, in all circumstances, it is not necessary for us to make any finding as to whether the CUOE should not have been certified in accordance with section 15 or that the CUOE collective agreement should be deemed null and void pursuant to section 53.
- 46. In summary, the Board declares:
 - (i) that Tilbury Concrete Transport Inc. and Tilbury Concrete Inc. are related employers for the purposes of the Act;
 - (ii) that they were related as of the time of their incorporation in 1992;
 - (iii) that the Teamsters' bargaining rights with respect to the responding parties are effective as of the date on which the Teamsters obtained

bargaining rights with respect to Tilbury Concrete Transport Inc., i.e., January 31, 1995; and

(iv) that the CUOE no longer represents employees of Tilbury Concrete Inc.

1192-94-M Southern Ontario Newspaper Guild Local 87, The Newspaper Guild, Applicant v. Thomson Newspapers Company Limited (Guelph Mercury Division), Responding Party

Employee - Employee Reference - Employer asking Board to exercise its discretion not to entertain union's application regarding "employee" status of newspaper's "weekend editor" - Employer asserting that union delayed in bringing application - Employer also asserting that no useful labour relations purpose would be served by determining issue of "employee" status because underlying issue would be resolved in employer's favour at arbitration dealing with question of inclusion/exclusion from bargaining unit - Board not accepting employer's assertions and authorizing Labour Relations Officer to inquire into weekend editor's duties and responsibilities

BEFORE: Roman Stoykewych, Vice-Chair, and Board Members Orval R. McGuire and K. Brennan.

DECISION OF THE BOARD; April 3, 1996

1. This is an application pursuant to what is presently section 114(2) of the *Labour Relations Act*, 1995, which provides as follows:

114(2) If, in the course of collective bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

- 2. The applicant trade union asserts that Mr. Gavin Fletcher, who is engaged in the "Weekend Editor" position with the responding party employer, is an "employee" within the meaning of the Act and seeks a declaration from the Board to that effect. In its reply materials filed with the Board, the responding party employer contends that Mr. Fletcher is properly excluded from the provisions of the Act on the basis of his performance of managerial functions, and further, takes the position that, for reasons relating to the circumstances in which the present application was filed, the Board should exercise its discretion and not entertain the application.
- Although there is a significant dispute on the facts with respect to the duties and responsibilities performed by Mr. Fletcher, there appears to be little disagreement with respect to those factual matters underlying the employer's request that the matter not be entertained by the Board. The applicant was issued a final certificate with respect to the full-time unit of employees on September 10, 1991. At this time, the Weekend Manager position was not yet extant and, of course, the exclusion of the position was neither contemplated nor discussed by the parties during the certification process. The position was created and designated by the employer as managerial in April, 1992, during the course of organizational changes in the employer's operations.

- 4. It is agreed that, shortly thereafter, the union advised the employer that it was of the view that the position was properly within the scope of the bargaining unit. Although the employer continued to take the position that the Weekend Editor was properly excluded as managerial, the parties agreed to defer the further discussion of the matter until after the first collective agreement was settled by means of the interest arbitration proceedings that were commencing at the time. However, the first agreement was not finally settled until May, 1994 and contained a recognition clause that, in relevant part, provides as follows:
 - 1.01. 2. This Agreement covers all employees of Thomson Newspaper Company Limited employed in the editorial department of the Daily Mercury Division, in the County of Wellington, save and except city editor, managing editor, wire editor, regional editor, and persons exercising managerial functions or employed in a confidential capacity in matters related to labour relations within the meaning of section 1 (3) (b) of the Act.
 - 1.03 (sic) In the event the employer creates a new position the parties shall discuss the issue of inclusion or exclusion from the bargaining unit. If the parties cannot agree as to the issues of inclusion or exclusion from the bargaining unit, the issues will be referred to the Ontario Labour Relations Board for "determination of employee status".
- 5. As can be seen, the Weekend Manager position was not expressly excluded from the terms of the agreement in the arbitrator's award. Shortly thereafter, the union again raised the issue of the Weekend Manager position, and, again, no agreement could be reached. Within two weeks, the present application was filed with the Board.
- Bearing in mind these circumstances, we are not persuaded by the employer's arguments that the Board ought to exercise its discretion and not process this application in light of the union's delay in bringing the application and because the union has not, in its pleadings, demonstrated any "changes" in the job functions of the Weekend Manager. In particular, the Board notes that the employer was advised of the union's position that the Weekend Manager ought to be included in the bargaining unit immediately upon that position's creation, and that, at that time, the parties agreed to defer the matter until the terms of the collective agreement were determined. The union then promptly raised the matter and, failing agreement, immediately filed the present application. Simply put, there is no agreement by the union with the employer's position in this matter, nor is there a course of conduct by it that could reasonably give rise to the inference that the present applicant had acquiesced to the employer's position. (See *The Windsor Star*, [1988] OLRB Rep. Apr. 427) Indeed, the opposite appears to have been the case and the issue of the "employee" status of the person working in the Weekend Editor position can be fairly seen as outstanding between the parties throughout the entire period.
- 7. The employer further argues that the Board ought to decline to hear this matter because it would serve no useful labour relations purpose since the underlying issue, i.e., whether Mr. Gavin is properly included in the bargaining unit, would be resolved in the employer's favour at an arbitration of that question. In this regard, the employer has set out certain arguments which, were they to be raised at arbitration, it asserts, would be practically dispositive of the underlying "inclusion/exclusion" issue before the arbitrator.
- 8. Even assuming that the arguments advanced by the employer would prevail at arbitration (a matter over which we decline to express an opinion), we are not persuaded that these are circumstances in which the Board ought to refuse to consider the application. While the Board is mindful that questions concerning "employee" status and those of inclusion in a bargaining unit frequently overlap to a considerable degree in practical terms, they are nevertheless neither identical nor coextensive. For that reason, the Board has been reluctant to exercise a discretion not to hear an "employee" status application simply because the "underlying issue" might be resolved at

arbitration in a particular manner. In London Free Press Printing Company Limited, [1993] OLRB Rep. Oct. 977, a case in which the positions occupied by the persons whose employee status was in question were specifically excluded by the provisions of the collective agreement, the Board explained:

We agree that there must be a "question" between the parties regarding the "employee" status or "guard" status of a person before the Board has jurisdiction to deal with the matter. However, once the Board is satisfied that an application under section 108(2) raises a real "employee" or "guard" issue, the Board will proceed with it, even when the "real" issue is whether that person is or should be in a bargaining unit, unless there is a cogent reason not to. It is not apparent that section 108(2) gives the Board a discretion to refuse to entertain an application on the basis that the "real" issue is something else. Further, the parties, not the Board, are in the best position to assess the labour relations value of a section 108(2) determination by the Board.

- In London Free Press, supra, the Board noted that while a determination that a person is an "employee" under the Act would not resolve the further issue of whether that employee is covered by the terms of a collective agreement between the parties, nonetheless a determination that a person is not an "employee" would be of utility to the parties in that it would effectively resolve the collective agreement issue since, under the statute, only "employees" may be covered by the terms of a collective agreement. In any event, a determination by the Board, even where it results in a finding that the person in question has "employee" status, could be of substantial assistance to the parties during the course of further collective agreement negotiations or in resolving related issues at arbitration. In this respect, it must be considered that the negotiation of issues concerning "employee" status is constrained by the prohibition against bargaining the scope of the unit to impasse and, as a result, an application under subsection 114(2) provides a uniquely authoritative and peaceful method of resolution of the difficult issues regarding one aspect of the ongoing scope of the union's bargaining rights. In light of these considerations, and in view of the circumstances of the present application outlined above, we are satisfied that the applicant has raised a "question" related to the employee status of Mr. Fletcher and, further, we are not persuaded that no labour relations purpose would be served by inquiring into his duties and responsibilities.
- 10. Finally, we are not persuaded that Article 1.03 of the collective agreement, which sets out a procedure for the determination of the "employee" status of the incumbents of "new positions", is of assistance to the employer. Even were the Weekend Editor position not to be considered a "new position" within the meaning of that provision (which, once again, is a matter over which we expressly decline to express a view), we do not see that in any way affecting our capacity or ability to hear the present application. In the Board's view, the collective agreement provision serves a facilitative, rather than restrictive, function and cannot be seen as obstructing the applicant's ability to seek relief under the provisions of the statute.
- 11. Having regard to the foregoing, then, the Board finds that it is appropriate to enquire into the question of the "employee" status of Gavin Fletcher. Accordingly, the Board authorizes a Labour Relations Officer, to be designated by the Board's Manager of Field Services, to inquire into and report to the Board with respect to the duties and responsibilities of Mr. Fletcher.









CASE LISTINGS FEBRUARY 1996

	PAGE
1.	Applications for Certification
2.	Applications for Combination of Bargaining Units
3.	Applications for Declaration of Related Employer
4.	Sale of a Business
5.	Union Successor Rights
6.	Applications for Declaration Terminating Bargaining Rights
7.	Ministerial Reference
8.	Complaints of Unfair Labour Practice
9.	Applications for Interim Order
10.	Applications for Consent to Early Termination of Collective Agreement
11.	Jurisdictional Disputes
12.	Complaints under the Occupational Health and Safety Act
13.	Hospital Labour Disputes Arbitration Act (Unfair Labour Practice)
14.	Construction Industry Grievances
15.	Crown Employees Collective Bargaining Act
16.	Applications for Reconsideration of Board's Decision



APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 1996

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2246-93-R: Service Employees Union Local 268 affiliated with the S.E.I.U. A.F. of L., C.I.O. and C.L.C. (Applicant) v. Geraldton District Hospital Incorporated (Respondent)

Unit #1: "all paramedical employees of Geraldton District Hospital Incorporated in the Town of Geraldton, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights on the date of applications" (11 employees in unit) (Having regard to the agreement of the parties)

Unit #2: "all office and clerical employees of Geraldton District Hospital in the Town of Geraldton save and except supervisors, persons above the rank of supervisor, Secretary to the Director of Nursing and the Accounting and Personnel Supervisor, Administrative Assistant, and persons for whom a trade union held bargaining rights on the date of application" (9 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

3071-94-R: United Food and Commercial Workers International Union, AFL-CIO-CLC (Applicant) v. Oshawa Group Limited (Respondent)

Unit: "all employees of Oshawa Foods Limited at 351 Margaret Avenue in the City of Kitchener, save and except department managers and persons above the rank of department managers" (85 employees in unit)

3072-94-R: United Food and Commercial Workers International Union, AFL-CIO-CLC (Applicant) v. Oshawa Group Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Oshawa Foods Limited at 720 Westmount Road East in the City of Kitchener, save and except department managers and persons above the rank of department managers" (76 employees in unit)

4709-94-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Famous Players Inc. (Respondent)

Unit: "all employees of Famous Players Inc. at the Jackson Square Cinemas in the City of Hamilton, save and except Relief Managers and persons above the rank of Relief Manager" (28 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Bargaining Agents Certified Subsequent to Vote

1788-95-R: Ontario English Catholic Teachers' Association (Applicant) v. The York Region Roman Catholic Separate School Board (Respondent)

Unit: "all occasional teachers employed by the York Region Roman Catholic Separate School Board, save and except persons who when they are employed as substitutes for other teachers are teachers as defined in The School Boards and Teachers Collective Negotiations Act." (542 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list	402
Number of persons listed as in dispute	0
Number of persons who cast ballots	110

	Number of ballots excluding segregated ballots cast by persons whose names appear on	
1	voter's list	0
,	Number of segregated ballots cast by persons whose names appear on voter's list	0
	Number of segregated ballots cast by persons whose names do not appear on voters' list	0
	Number of spoiled ballots	0
	Number of ballots marked in favour of applicant	104
	Number of ballots marked against applicant	2
	Number of ballots segregated and not counted	4

2825-95-R: United Food and Commercial Workers International Union (Applicant) v. K. Leader's Food Market (Respondent)

Unit: "all employees of K. Leader's Food Market in the Town of Orangeville, save and except Assistant Store Manager, persons above the rank of Assistant Store Manager, Secretary/Bookkeeper and Head Cashier" (11 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	40
Number of persons who cast ballots	37
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	12
Number of ballots segregated and not counted	1

3291-95-R: IBEW Construction Council of Ontario (Applicant) v. 1078032 Ontario Inc. c.o.b. as Voltron Electrical Corp. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of 1078032 Ontario Inc. c.o.b. as Voltron Electrical Corp., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of 1078032 Ontario Inc. c.o.b. as Voltron Electrical Corp., in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (17 employees in unit)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	25
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	8

3359-95-R: Ontario Public Service Employees Union (Applicant) v. The Denise House Sedna Women's Shelter & Support Services Inc. (Respondent)

Unit: "all employees of The Denise House Sedna Women's Shelter & Support Services Inc. in the City of Oshawa, save and except administrative assistants, Co-ordinators and persons above the rank of Co-ordinator" (24 employees in unit) (Having regard to the agreement of the parties)

3360-95-R: Ontario Secondary School Teachers' Federation (Applicant) v. North Shore District Roman Catholic Separate School Board (Respondent)

Unit: "all employees of the North Shore District Roman Catholic Separate School Board save and except custodians, maintenance personnel, persons employed as occasional teachers, students employed during the school vacation period, persons working for the employer on work experience and/or training or incentive programs and employees in any bargaining unit for which any trade union held bargaining rights as of December 7, 1995" (45 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	51
Number of persons who cast ballots	41
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	41
Number of ballots marked in favour of applicant	40
Number of ballots marked against applicant	1

3374-95-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit #2: "all security guards of Meadowvale Security Guard Services Inc. employed at 319-320-330 Front Street West, in the Municipality of Metropolitan Toronto, save and except site supervisors and persons above the rank of site supervisor" (12 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	4
Number of ballots, excluding segregated ballots, cast by persons whose names appear on	
voters' list	4
Number of segregated ballots cast by persons whose names appear on voters' list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	()

3475-95-R: The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of United States and Canada Local 105, London, Ont. (Applicant) v. Theatre London operating as The Grand Theatre (Respondent)

Unit: "all wig and wardrobe attendant employees of Theatre London operating as The Grand Theatre in the City of London, County of Middlesex, save and except supervisors, and persons above the rank of supervisor" (12 employees in unit)

Number of names of persons on revised voters' list	12
Number of persons listed as in dispute	0
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	: 0
Number of spoiled ballots	()
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	()
Number of ballots segregated and not counted	()

3569-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Tarxien Components Corporation (Respondent)

Unit: "all employees of Tarxien Components Corporation in the City of Vaughan in the Regional Municipality of York, save and except Co-ordinators, persons above the rank of Co-ordinator, office, clerical, engineer-

ing and sales staff, Process Technician, Customer Liaison Representative, Q.C. Auditor and students employed during the school vacation period" (199 employees in unit) (Having regard to the agreement of the parties)

]	Number of names of persons on revised voters' list	200	
	Number of persons who cast ballots	186	ı
	Number of ballots excluding segregated ballots cast by persons whose names appear	on	
,	voter's list	177	
]	Number of segregated ballots cast by persons whose names appear on voter's list	8	
	Number of segregated ballots cast by persons whose names do not appear on voters'	list 1	
	Number of ballots marked in favour of applicant	108	i
	Number of ballots marked against applicant	70	1
,	Number of ballots segregated and not counted	8	

3605-95-R: Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs Warehousemen and Helpers of America (Applicant) v. Markham Woodbine Hospitality Limited c.o.b. as Chimo Hotels and Holiday Inn Hotel & Suites (Respondent)

Unit: "all employees employed by Markham Woodbine Hospitality Limited c.o.b. as Chimo Hotels and Holiday Inn Hotel & Suites at 7095 Woodbine Avenue in the City of Markham, Ontario, save and except supervisors, persons above the rank of supervisor, office, sales, accounting, security guard and front desk employees and students employed during the school vacation period" (139 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	182
Number of persons who cast ballots	81
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	68
Number of segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	45
Number of ballots marked against applicant	23
Number of ballots segregated and not counted	13

3644-95-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Local 221 (Applicant) v. G & S General Contractors, A Division of 659367 Ontario Inc. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of G & S General Contractors, A Division of 659367 Ontario Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of G & S General Contractors, A Division of 659367 Ontario Inc. in all sectors of the construction industry in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	10
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	0

3647-95-R: Labourers' International Union of North America, and Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 517739 Ontario Ltd., c.o.b. as Rolan Plumbing (Respondent)

Unit: "all plumbers and plumbers' apprentices in the employ of 517739 Ontario Ltd., c.o.b. as Rolan Plumbing in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Number of names of persons on list as originally prepared by employer	
Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0

3694-95-R: Canadian Security Union U.F.C.W. Local 333 (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all security officers in the employ of Group 4 C.P.S. Limited in the Regional Municipality of Hamilton/Wentworth, Ontario, save and except supervisors and persons above the rank of supervisor" (2 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3704-95-R: Teamsters, Local Union 938 (Applicant) v. J.B. Rolland Papers Ltd. (Respondent)

Unit: "all employees of J.B. Rolland Papers Ltd. in Metropolitan Toronto, save and except warehouse manager, persons above the rank of warehouse manager, office and sales staff" (16 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	15
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	6

3707-95-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. The Corporation of the Town of Huntsville (Respondent)

Unit: "all outside employees of The Corporation of the Town of Huntsville, save and except the Superintendent of Parks and Facilities, persons above the rank of Superintendent, office and clerical staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation periods, and those persons for whom any other trade union holds bargaining rights" (6 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear of	n
	6
voter's list Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose hames appear on voter shift	O.

Number of segregated ballots cast by persons whose names do not	appear on voters' list 0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0

3710-95-R: I.B.E.W. Construction Council of Ontario (Applicant) v. 797697 Ontario Limited c.o.b. as Lynes Electric (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of 797697 Ontario Limited c.o.b. as Lynes Electric in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of 797697 Ontario Limited c.o.b. as Lynes Electric in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; and the County of Dufferin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	6
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

3754-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. 461804 Ontario Limited o/a Bramalea Rebuilders (Respondent)

Unit: "all employees of 461804 Ontario Limited o/a Bramalea Rebuilders in the City of Brampton, save and except foremen, persons above the rank of foreman, office, clerical, students and sales staff" (66 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	73
Number of persons who cast ballots	71
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	68
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	50
Number of ballots marked against applicant	17
Number of ballots segregated and not counted	2

3759-95-R: International Union of Operating Engineers, Local 793 (Applicant) v. Hard Rock Paving Company Limited (Respondent) v. Canadian Brotherhood Of Railway Transport And General Workers - Canadian Auto Workers (Intervener)

Unit: "all employees of Hard Rock Paving Company Limited engaged in its roadbuilding operations in and out of the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen, persons above the rank of non-working foreman, office and sales staff and persons regularly employed for not more than twenty-four hours per week. Note: Classification as follows: (a) construction labourers; (b) truck drivers; (c) employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same" (7 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	33

Number of ballots excluding segregated ballots cast by persons whose names appear on		
voter's list	10	
Number of segregated ballots cast by persons whose names appear on voter's list	23	
Number of segregated ballots cast by persons whose names do not appear on voters' list	0	
Number of spoiled ballots	0	
Number of ballots marked in favour of applicant	8	
Number of ballots marked in favour of intervener	2	
Number of ballots segregated and not counted	23	

3760-95-R: International Union of Operating Engineers, Local 793 (Applicant) v. R. E. Law Crushed Stone Limited (Respondent) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (C.A.W. Canada) (Intervener)

Unit: "all employees of R. E. Law Crushed Stone Limited in and out of the Regional Municipality of Niagara, save and except foremen and persons above the rank of foreman, office and sales staff and persons regularly employed for not more than 24 hours per week" (17 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	13
Number of ballots marked in favour of intervener	3
Number of ballots segregated and not counted	0

3786-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Magalloy Ltd. - Division of Wescast Industries (Respondent)

Unit: "all employees of Magalloy, Division of Westcast Industries Inc., in the City of Stratford located in Perth County, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical, engineering, sales staff, and students employed for the summer vacation period" (42 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	43
Number of persons who cast ballots	42
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	29
Number of ballots marked against applicant	11

3787-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. John Hauser Iron Works Limited (Respondent)

Unit: "all employees of John Hauser Iron Works Limited in the City of Waterloo, save and except supervisors/group leaders, persons above the rank of supervisor/group leader, office, clerical, engineering, sales staff, and students employed during the summer vacation period" (59 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	61
Number of persons who cast ballots	59
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	57

Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	35
Number of ballots marked against applicant	22
Number of ballots segregated and not counted	2

3803-95-R: Canadian Union of Public Employees (Applicant) v. Brookhaven Childcare - North York (Respondent)

Unit: "all employees of Brookhaven Childcare - North York in the City of North York, save and except Supervisor and persons above the rank of Supervisor" (7 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	7
Number of ballots, excluding segregated ballots, cast by persons whose names appear on	
voters' list	0
Number of segregated ballots cast by persons whose names appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3811-95-R: Power Workers' Union CUPE Local 1000 - CLC (Applicant) v. The Vaughan Hydro-Electric Commission (Respondent)

Unit: "all employees of The Vaughan Hydro-Electric Commission, save and except Supervisors and Forepersons; persons above the rank of Supervisor or Forepersons; secretaries; Financial Officer; Accountant; Engineering Associates; Designers; Technologists; Engineers; Co-ordinators; students employed during the school vacation. Students employed on a co-operative training program, and temporary employees whose terms of employment do not exceed 130 days per year, or whose terms of employment are part of a Government subsidized work program" (85 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	103
Number of persons who cast ballots	85
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	85
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	85
Number of ballots marked in favour of intervener	0
Number of ballots segregated and not counted	0

3816-95-R: Ontario Public Service Employees Union (Applicant) v. Northwestern General Hospital (Respondent)

Unit: "all paramedical employees at Northwestern General Hospital in the Municipality of Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, and persons for whom any trade union held bargaining rights as of February 2, 1996" (21 employees in unit) (Having regard to the agreement of the parties) (Clarity Note)

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

Number of spoiled ballots	0
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Without Vote

0823-95-R: United Steelworkers of America (Applicant) v. Barber-Collins Security Services Ltd. (Respondent) v. Kaufman Footwear, J.M. Schneider Inc. (Interveners)

0922-95-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. High Tech Woodworkers Ltd. (Respondent)

Applications for Certification Dismissed Subsequent to Vote

3701-94-R: Hospitality Employees Service Employees Union of Canada HESEU (Applicant) v. Versa Services Ltd. (Respondent) v. Hotel Employees Restaurant Employees Union, Local 75 (Intervener)

0374-95-R: HESEU Hospitality Employees Service Employees Union of Canada (Applicant) v. Little Caesars of Canada Inc. (Respondent)

2562-95-R: Ontario Pipe Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Omico Mechanical Limited (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the responding party in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	9

3317-95-R: Labourers' International Union of North America Local 183 (Applicant) v. Hallmark Housekeeping Services Inc. (Respondent)

Unit: "all employees of Hallmark Housekeeping Services Inc. engaged in cleaning and maintenance at the Airway Centre, 5915 - 55 Airport Road, Mississauga, Ontario, save and except supervisory personnel, persons above the rank of supervisory personnel, office and sales staff" (20 employees in unit)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	32
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	6

3374-95-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit #1: "all security guards of Meadowvale Security Guard Services Inc. employed at 720 Bay Street, in the

Municipality of Metropolitan Toronto, save and except site supervisors and persons above the rank of site supervisor" (12 employees in unit)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0
Number of names of persons on revised voters' list	5
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

Unit #2: (see Bargaining Agents Certified subsequent to a Post-Hearing vote)

3487-95-R: Civic Staff Employees' Association (Applicant) v. The Corporation of the City of Thunder Bay (Respondent) v. The Canadian Union of Public Employees and its Local 87 (Interveners)

Unit: "all employees of the Corporation of the City of Thunder Bay, save and except Division Managers and persons above the rank of Division Managers, seasonal employees, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, contract employees, employees in a bargaining unit for which any trade union held bargaining rights as of December 22, 1995 and any persons employed by the Thunder Bay Community Auditorium, Thunder Bay Community Housing, Thunder Bay Economic Development Corporation, Thunder Bay Parking Authority and Victoriaville Centre Management and Leasing" (256 employees in unit)

3502-95-R: Labourers' International Union of North America, Local 506 (Applicant) v. Metropolitan Toronto Convention Centre Corporation (Respondent) v. Laundry & Linen Drivers and Industrial Workers, Local 847 affiliated with the International Brotherhood of Teamsters, AFL-CIO, CLC (Intervener)

Unit: "all employees of Metropolitan Toronto Convention Centre Corporation in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, security staff and casual employees" (300 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	193
Number of persons who cast ballots	183
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	143
Number of segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names do not appear on voters' list	27
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	88
Number of ballots marked in favour of intervener	51
Number of ballots segregated and not counted	43

3636-95-R: The Canadian Union of Operating Engineers and General Workers (Applicant) v. Value Village Stores Inc. (Respondent)

Unit: "all employees of Value Village Inc. in the City of Brampton, save and except Assistant Supervisors, and persons above the rank of Assistant Supervisor" (26 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	25
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	15
Number of ballots segregated and not counted	0

3651-95-R: Service Employees International Union, Local 204 affiliated with the S.E.I.U., A. F. of L., C.I. O., C.L.C. (Applicant) v. Cardinal Flahiff Basilian Centre (Basilian Fathers of Toronto) (Respondent)

Unit: "all employees of Cardinal Flahiff Basilian Centre in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and office and clerical staff." (32 employees in unit)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	28
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	16

3672-95-R: United Steelworkers of America (Applicant) v. Serpac Containers Limited (Respondent)

Unit: "all employees of Serpac Containers Limited in the City of Cambridge, save and except supervisors, persons above the rank of supervisors, office, clerical and sales staff" (70 employees in unit) (Having regard to the agreement of the parties)

Number of names of persons on revised voters' list	73
Number of persons who cast ballots	73
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	71
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	35
Number of ballots marked against applicant	37

3686-95-R: Canadian Union of Public Employees (Applicant) v. Résidence St. Louis (Respondent)

Unit: "all employees of Résidence St. Louis in Orleans, Ontario, save and except Professional Medical Staff, Registered and Graduate Nurses, Professional Staff, Technical Personnel, Office and Clerical Staff, Supervisors, Foremen, persons above the rank of Foreman, Plant Manager and Assistant Plant Manager and any persons for whom a trade union held bargaining rights on the date of application (21 employees in unit)

Number of names of persons on revised voters' list Number of persons who cast ballots	21 16
Number of ballots, excluding segregated ballots, cast by persons whose names appear on	1
voters' list	16
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	8

3758-95-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Medieval Times Dinner & Tournament (Toronto) Inc. (Respondent)

Unit: "all employees of the Company employed at Exhibition Place in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, accounting, payroll and marketing staff" (138 employees in unit)

Number of names of persons on revised voters' list	137
Number of persons who cast ballots	120
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	117
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	54
Number of ballots marked against applicant	63
Number of ballots segregated and not counted	3

3802-95-R: International Brotherhood of Painters and Allied Trades, Local 205 (Applicant) v. Clarke & Company Contractors Ltd. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Clarke & Co. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of Clarke & Co. in all other sectors in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman" (19 employees in unit)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	9

3814-95-R: United Steelworkers of America (Applicant) v. Serca Foodservice Inc., Marsh Division (Respondent)

Unit: "all employees of Serca Foodservice Ind., Marsh Division in the City of Windsor, save and except foreperson, persons above the rank of foreperson, office and sales staff and employees covered by an existing collective agreement" (29 employees in unit)

Number of names of persons on revised voters' list	1
Number of persons who cast ballots	0
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	0

Applications for Certification Withdrawn

0526-95-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. 1105945 Ontario Limited c.o.b. as System Drywall & Acoustics (Respondent) v. Drywall Acoustic Lathing and Insulation, Local 675, United Brotherhood of Carpenters and Joiners of America, (Intervener)

1309-95-R: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Quality Masonry (Respondent)

1956-95-R: United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Applicant) v. Carr Steel Investments Ltd. (Respondent)

3524-95-R: Canadian Union of Professional Security Guards (Applicant) v. The Ontario Jockey Club (Respondent) v. International Union, United Plant Guard Workers of America, Local 1962 (Intervener)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

1333-95-R: Service Employees' Union, Local 210 (Applicant) v. Elgin Abbey Nursing Home (Respondent) (*Terminated*)

1525-95-R: Canadian Union of Public Employees (Applicant) v. Fairhaven Home for Senior Citizens (Respondent) (Withdrawn)

1803-95-R: Ontario Public Service Employees Union (Applicant) v. Nipissing University (Respondent) (Terminated)

2046-95-R: Ontario Public Service Employees Union (Applicant) v. Sudbury Memorial Hospital (Respondent) (Dismissed)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0887-92-R: Labourers' International Union of North America, Local 183 (Applicant) v. Ferretti Forming Inc., Fer-Pal Construction Ltd. (Respondents) v. International Union of Operating Engineers, Local 793 (Intervener) (*Dismissed*)

3581-94-R; 4098-94-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Aikenhead's Home Improvement Warehouse Inc., Home Depot of Canada Inc., First Professional Management Inc., Fanfare Holdings Limited, Stercon Investments Limited, Stephen-Mitchell Realty Limited (Respondents); Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Aikenhead's Home Improvement Warehouse Inc., Home Depot of Canada Inc., First Professional Management Inc., Fanfare Holdings Limited, Stercon Investments Limited, Stephen-Mitchell Realty Limited, Sterling Tile Contractors, Sterling Tile and Carpet, Stephen Mitchell Enterprises Limited, Glengreen Holdings Limited, 3033023 Canada Limited, 502627 Ontario Limited (Respondents) (Dismissed)

4570-94-R: Millwright District Council of Ontario (Applicant) v. RLP Mechanical Ltd., RLP Machine & Steel Fabrication Inc. (Respondents) v. George David (Intervener) (*Terminated*)

0880-95-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. 1003097 Ontario Limited c.o.b. as D & P Cleaners and United Food and Commercial Workers Local 175 (Respondents) (*Terminated*)

1015-95-R: International Brotherhood of Painters and Allied Trades, and Glaziers, Local 1819 (Applicant) v. George Schneider & Son Glazing Limited, Sota Glazing Inc., Saturn Metal Inc. (Respondents) (*Granted*)

1165-95-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, and United Brotherhood of Carpenters and Joiners of America, locals 785 and 2050 (Applicants) v. Dobben Group Inc., Dobben Construction Inc., Marcon Contractors Inc., and Con-Ex Inc. (Respondent) (Dismissed)

1208-95-R: National Automobile Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 252 (Applicant) v. Exide Canada Inc. and Yuasa Exide (Canada) Inc. (Respondents) (Withdrawn)

1566-95-R: The International Brotherhood of Painters and Allied Trades, The Ontario Council of the International Brotherhood of Painters and Allied Trades and the International Brotherhood of Painters and Allied

Trades, Local 1671 (Applicant) v. Knudsens Painters & Decorators Limited, 1065471 Ontario Limited c.o.b. as Kameo Enterprises (Respondents) (*Dismissed*)

2474-95-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. 630599 Ontario Limited c.o.b. as Domcan Acoustical Company, Steflou Wall System & Acoustical Company (Respondents) (*Endorsed Settlement*)

2570-95-R: United Brotherhood of Carpenters and Joiners of America, Local 1669 (Applicant) v. GC Rentals & Enterprise Ltd., Carr Steel Investments Ltd. (Respondents) (*Withdrawn*)

2671-95-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Belmont Drywall & Acoustics Ltd., JMC Drywall & Acoustics Ltd., 1105945 Ontario Ltd. carrying on business as System Drywall Acoustics (Respondents) v. Bricklayers, Masons Independent Union of Canada Local 1 (Intervener) (Withdrawn)

3371-95-R: United Brotherhood of Carpenters and Joiners of America, Local 1669 (Applicant) v. Robert Macleod carrying on business as Pyramid Custom Builders, M.N.T. Builders Limited, Leemac Group Inc. (Respondents) (*Endorsed Settlement*)

3593-95-R: International Union of Operating Engineers, Local 793 (Applicant) v. D.I.G.R. Excavating Ltd. and Blackhawk Earthmoving Company Limited (Respondents) (*Endorsed Settlement*)

3712-95-R: Labourers' International Union of North America, Local 607 (Applicant) v. MNT Builders Limited and Leemac Group Inc. (Respondents) (*Granted*)

SALE OF A BUSINESS

0887-92-R: Labourers' International Union of North America, Local 183 (Applicant) v. Ferretti Forming Inc., Fer-Pal Construction Ltd. (Respondents) v. International Union of Operating Engineers, Local 793 (Intervener) (*Dismissed*)

3581-94-R; 4098-94-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. First Professional Management Inc., Fanfare Holdings Limited, Stercon Investments Limited, Stephen-Mitchell Realty Limited, Aikenhead's Home Improvement Warehouse Inc., Home Depot of Canada Inc. (Respondents); Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Aikenhead's Home Improvement Warehouse Inc., Home Depot of Canada Inc., First Professional Management Inc., Fanfare Holdings Limited, Stercon Investments Limited, Stephen-Mitchell Realty Limited, Sterling Tile Contractors, Sterling Tile and Carpet, Stephen Mitchell Enterprises Limited, Glengreen Holdings Limited, 3033023 Canada Limited, 502627 Ontario Limited (Respondents) (Dismissed)

4570-94-R: Millwright District Counil of Ontario (Applicant) v. RLP Mechanical Ltd., RLP Machine & Steel Fabrication Inc. (Respondents) v. George David (Intervener) (*Terminated*)

1015-95-R: International Brotherhood of Painters and Allied Trades, and Glaziers, Local 1819 (Applicant) v. George Schneider & Son Glazing Limited, Sota Glazing Inc., Saturn Metal Inc. (Respondents) (*Granted*)

1165-95-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, and United Brotherhood of Carpenters and Joiners of America, locals 785 and 2050 (Applicants) v. Dobben Group Inc., Dobben Construction Inc., Marcon Contractors Inc., and Con-Ex Inc. (Respondent) (Dismissed)

1566-95-R: The International Brotherhood of Painters and Allied Trades, The Ontario Council of the International Brotherhood of Painters and Allied Trades and the International Brotherhood of Painters and Allied Trades, Local 1671 (Applicant) v. Knudsens Painters & Decorators Limited, 1065471 Ontario Limited c.o.b. as Kameo Enterprises (Respondents) (*Dismissed*)

- **2474-95-R:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. 630599 Ontario Limited c.o.b. as Domcan Acoustical Company, Steflou Wall System & Acoustical Company (Respondents) (*Endorsed Settlement*)
- **2570-95-R:** United Brotherhood of Carpenters and Joiners of America, Local 1669 (Applicant) v. GC Rentals & Enterprise Ltd., Carr Steel Investments Ltd. (Respondents) (*Withdrawn*)
- 2671-95-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Belmont Drywall & Acoustics Ltd., JMC Drywall & Acoustics Ltd., 1105945 Ontario Ltd. carrying on business as System Drywall Acoustics (Respondents) v. Bricklayers, Masons Independent Union of Canada Local 1 (Intervener) (Withdrawn)
- **3371-95-R:** United Brotherhood of Carpenters and Joiners of America, Local 1669 (Applicant) v. Robert Macleod carrying on business as Pyramid Custom Builders, M.N.T. Builders Limited, Leemac Group Inc. (Respondents) (*Endorsed Settlement*)
- **3593-95-R:** International Union of Operating Engineers, Local 793 (Applicant) v. D.I.G.R. Excavating Ltd. and Blackhawk Earthmoving Company Limited (Respondents) (*Endorsed Settlement*)
- **3712-95-R:** Labourers' International Union of North America, Local 607 (Applicant) v. MNT Builders Limited and Leemac Group Inc. (Respondents) (*Granted*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

- 3223-95-R: United Steelworkers of America (Applicant) v. Goodyear Canada Inc., Bowmanville Plant (Respondent) (Granted)
- **3224-95-R:** United Steelworkers of America (Applicant) v. Kaufman Footwear, Div. of William H. Kaufman Inc. (Respondent) (*Granted*)
- 3225-95-R: United Steelworkers of America (Applicant) v. Perstorp Components (Canada) Inc. (Respondent) (Granted)
- **3226-95-R:** United Steelworkers of America (Applicant) v. Genpak Canada (Division of Hamelin Group Inc.) (Respondent) (*Granted*)
- 3227-95-R: United Steelworkers of America (Applicant) v. Gates Canada Inc. (Respondent) (Granted)
- 3228-95-R: United Steelworkers of America (Applicant) v. Dayco Products Canada Inc. (Respondent) (Granted)
- **3230-95-R:** United Steelworkers of America (Applicant) v. 372116 Ontario Limited c.o.b. as Hemispheres International Mfg. Co. (Respondent) (*Granted*)
- 3231-95-R: United Steelworkers of America (Applicant) v. Versa Services Limited (Respondent) (Granted)
- 3232-95-R: United Steelworkers of America (Applicant) v. Canada Cordage Inc. (Respondent) (Granted)
- **3233-95-R:** United Steelworkers of America (Applicant) v. Canadian General-Tower Limited (Respondent) (*Granted*)
- 3235-95-R: United Steelworkers of America (Applicant) v. Custom Trim Ltd. (Respondent) (Granted)
- 3236-95-R: United Steelworkers Of America (Applicant) v. Foseco-Morval Inc. (Respondent) (Granted)
- 3237-95-R: United Steelworkers Of America (Applicant) v. RMS Corporation (Respondent) (Granted)

- 3239-95-R: United Steelworkers of America (Applicant) v. PFB Corporation (Respondent) (Granted)
- **3240-95-R:** United Steelworkers Of America (Applicant) v. Custom Leather Canada Limited (Respondent) (*Granted*)
- 3246-95-R: United Steelworkers of America (Applicant) v. Wegu Canada Inc. (Respondent) (Granted)
- 3247-95-R: United Steelworkers Of America (Applicant) v. Huntsman Film Products of Canada, Ltd. (Respondent) (Granted)
- 3248-95-R: United Steelworkers of America (Applicant) v. Goodyear Canada Inc. (Respondent) (Granted)
- 3249-95-R: United Steelworkers Of America (Applicant) v. Perstorp Components (Canada) Inc. (Respondent) (Granted)
- 3251-95-R: United Steelworkers of America (Applicant) v. Graham Packaging Canada Ltd. (Respondent) (Granted)
- 3252-95-R: United Steelworkers of America (Applicant) v. Goodyear Canada Inc. (Respondent) (Granted)
- 3253-95-R: United Steelworkers of America (Applicant) v. Versa Services Ltd. (Respondent) (Granted)
- 3254-95-R: United Steelworkers of America (Applicant) v. Goodyear Canada Inc. (Respondent) (Granted)
- 3255-95-R: United Steelworkers of America (Applicant) v. The Goodyear Services Store Niagara Peninsula Services Stores (Respondent) (*Granted*)
- 3256-95-R: United Steelworkers of America (Applicant) v. Plastomer Incorporated (Respondent) (Granted)
- 3257-95-R: United Steelworkers of America (Applicant) v. Standard Products (Canada) Limited (Respondent) (Granted)
- 3258-95-R: United Steelworkers of America (Applicant) v. BPCO, a Division of Emco (Respondent) (Granted)
- 3262-95-R: United Steelworkers of America (Applicant) v. RMS Corporation (Respondent) (Granted)
- **3263-95-R:** United Steelworkers of America (Applicant) v. Gentek Building Products Limited, Burlington Plant (Respondent) (*Granted*)
- 3264-95-R: United Steelworkers of America (Applicant) v. Textron Automotive Interiors, Division of Textron Canada Limited (Respondent) (Granted)
- 3265-95-R: United Steelworkers of America (Applicant) v. Western Publishing (Canada) Inc. (Respondent) (Granted)
- **3266-95-R:** United Steelworkers of America (Applicant) v. The Goodyear Service Stores a Division of Goodyear Canada Inc., Metropolitan Toronto Service Stores (Respondent) (*Granted*)
- 3268-95-R: United Steelworkers of America (Applicant) v. Biltrite Rubber (1984) Inc. (Respondent) (Granted)
- **3270-95-R:** United Steelworkers of America (Applicant) v. United Tire & Rubber Co. Limited (Respondent) (*Granted*)
- 3271-95-R: United Steelworkers of America (Applicant) v. Epton Industries Inc. (Respondent) (Granted)

3272-95-R: United Steelworkers of America (Applicant) v. Alliance Driver Services Inc. (Respondent) (Granted)

3273-95-R: United Steelworkers of America (Applicant) v. Tek Sign Inc. (Respondent) (Granted)

3274-95-R: United Steelworkers of America (Applicant) v. J.E. Thomas Specialties Ltd., Lindsay (Respondent) (Granted)

3275-95-R: United Steelworkers of America (Applicant) v. Garlock of Canada Ltd. (Respondent) (Granted)

3276-95-R: United Steelworkers of America (Applicant) v. Standard Products (Canada) Limited (Respondent) (Granted)

3310-95-R: Labourers' International Union Of North America, Local 184 (Applicant) v. Labourers' International Union of North America, Heavy, Highway and Related Construction Local Union No. 183 and the Employers and Employers' Organizations listed on Schedule "A" attached hereto (Respondent) v. Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Intervener) (Withdrawn)

3602-95-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Labourers International Union of North America (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2887-95-R: Employees of 549126 Ontario Limited, Operating as Woodlands Inn in the Town of Longlac (Applicant) v. Local 2693, IWA - Canada (Respondent) v. 549126 Ontario Limited (Intervener)

Unit: "all employees of 549126 Ontario Limited, Operating as Woodlands Inn in the Town of Longlac, save and except working supervisors, persons above the rank of supervisors, those persons regularly employed for more than 24 hours per week and students employed during the school vacation period" (11 employees in unit) (Granted)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	14
Number of ballots marked in favour of respondent	6
Number of ballots marked against respondent	6
Number of ballots segregated and not counted	2
Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	7
Number of ballots marked against respondent	8
Number of ballots segregated and not counted	0

3163-95-R: Pauline Stoddart (Applicant) v. Ontario Public Service Employees Union (Respondent) (Dismissed)

3509-95-R: The Employees of Axiom Colquhoun Audio Laboratories Limited (Applicant) v. IWA - Canada, Local 1-1000 (Respondent) v. Axiom Colquhoun Audio Laboratories Limited (Intervener)

Unit: "all employees of Colquhoun Audio Laboratories Limited at the Village of Dwight, save and except Production Manager and persons above the rank of Production Manager" (26 employees in unit) (Granted)

Number of names of persons on revised voters' list	29
Number of persons who cast ballots	21

Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	21
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	18

3519-95-R: Ian Crockford et al (Applicant) v. United Brotherhood of Carpenters and Joiners of America and its Local 1030 (Respondent) v. 520601 Ontario Ltd., o/a Ontario Truss and Wall (Intervener)

Unit: "all employees of 520601 Ontario Ltd. in the Township of Thurlow, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period" (16 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	10
Number of ballots segregated and not counted	1

3523-95-R: Steven R. Gerber (Applicant) v. International Brotherhood of Electrical Workers, Local 353 (Respondent) v. Edwards, A Unit of General Signal (Intervener)

Unit: "all employees of General Signal Limited working at or out of the City of Mississauga, in its service division of its Edwards unit, save and except supervisors, persons above the rank of supervisor, and office and sales staff" (47 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	45
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	45
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	22
Number of ballots marked against respondent	22
Number of ballots segregated and not counted	0

3570-95-R: Robert Snow (Applicant) v. Retail, Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America Local 414, United Steelworkers of America (Respondent) v. Woodstock 401 Service Centre Inc. (Intervener)

Unit: "all employees of Woodstock 401 Service Centre Inc. located in the Township of Southwest Oxford, save and except Assistant Managers and persons above the rank of Assistant Manager" (20 employees in unit) (*Terminated*)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	11

3599-95-R: Norman Thomas (Applicant) v. Retail Wholesale Canada Canadian Service Sector, Division of the United Steelworkers of America Local 1688 The Ontario Taxi Union (Respondent) v. Call-A-Cab Limited (Intervener) (*Dismissed*)

3652-95-R: Erin Park Automotive Limited (Applicant) v. National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW-Canada) (Respondent) (*Dismissed*)

3675-95-R: Lynda Roach (Applicant) v. Communications, Energy and Paperworkers Union of Canada, Local 333 (Respondent) v. Electro Arts Ltd. (Intervener) (*Dismissed*)

3677-95-R: The Brotherhood Foundation c.o.b. The Wexford (Applicant) v. Canadian Union of Public Employees and its Local 3791 (Respondent) (*Withdrawn*)

3692-95-R: Mark Ralston et al (Applicant) v. Teamsters Local Union 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen & Helpers (Respondent) v. Watson Building Supplies Co. Inc. (Intervener)

Unit: "all employees in the City of Concord save and except foremen, persons above the rank of foreman, and office staff." (17 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	14

3714-95-R: Thomas Laird (Applicant) v. Teamsters Union Local 141 (Respondent) v. Laidlaw Environmental Services Ltd. (London Facility) (Intervener)

Unit: "all employees of Laidlaw Environmental Services Ltd. in the Municipality of London, save and except dispatchers, persons above the rank of dispatcher, office and sales staff and laboratory technicians" (3 employees in unit) (*Terminated*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	2

3753-95-R: Anastasios Karpouzis (Applicant) v. Graphic Communications International Union, Local 500M (Respondent) v. Rammgraph Limited (Intervener)

Unit: "the Employer recognizes the Graphic Communications International Union, Local 500M, as the exclusive representative for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment for all those who are employed in the Lithographic Departments on or about offset presses or other lithographic presses and those employees who contribute in any manner to the making of lithographic plates in its plants located in the Province of Ontario" (6 employees in unit) (Terminated)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on	
voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	9
Number of ballots segregated and not counted	0

3828-95-R: Thomas Laird (Applicant) v. Teamsters Union Local 141 (Respondent) v. Laidlaw Environmental Services Ltd. (London Facility) (Intervener) (*Withdrawn*)

3933-95-R: Group 4 C.P.S. Limited, c.o.b. as Canadian Protection Services (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW) Canada, and its Local 252 (Respondent) (*Dismissed*)

3948-95-R: Guelph Rest Home Incorporation, c.o.b. as Heritage House Retirement Home (Applicant) v. Service Employees International Union, Local 532 affiliated with the A.F. of L., C.I.O., C.L.C. (Respondent) (Dismissed)

REFERRAL FROM MINISTER

3151-94-M: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) (*Terminated*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3728-93-U: David A. Rice (Applicant) v. Teamsters Local 647 (Respondent) (Withdrawn)

4151-93-U: International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. International Brotherhood of Electrical Workers (Respondent) v. The IBEW Electrical Power Systems Construction Council of Ontario, and International Brotherhood of Electrical Workers, Local Unions 105, 115, 120, 303, 402, 530, 586, 773, 804, 894, 1687 and 1739; Electrical Power Systems Construction Association and Ontario Hydro; International Brotherhood of Electrical Workers, Local Union 353 (Interveners) (*Dismissed*)

1933-94-U: Dr. James Winter (Applicant) v. The Faculty Association of the University of Windsor (Respondent) v. The University of Windsor (Intervener) (Dismissed)

2615-94-U: James John Stamos, International Trustee of Hotel Employees and Restaurant Employees Union, Local 75; Toronto, Ontario and Stacey Papernick (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46; Hotel Employees Restaurant Employees Union Local 75 (as it was between on or about May 1, 1994 until September 14, 1994), Jean-Guy Belanger (Respondents) (*Terminated*)

2980-94-U: Lissety Soriano (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 and The Delta Chelsea Inn, Delta Hotels & Resorts (Respondents) (*Dismissed*)

4078-94-U: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Vic Murai Holdings Ltd., Robert M. Heenan Sales Ltd., and Nile Landherr (Respondents) (Dismissed)

4113-94-U; 0805-95-U: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Hospitality Employees Service Employees Union of Canada, 1003097 Ontario Limited c.o.b. as D & P Cleaners (Re-

- spondents); Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Hospitality Employees Service Employees Union of Canada, Sip N' Chat Restaurant & Mr. Louk Paul (Respondents) (*Terminated*)
- **4407-94-U:** United Food and Commercial Workers International Union, Local 175 and Ken Harris (Applicants) v. Evergreen Returnable Co. Inc., Burt Mandicks and Willie Mandicks (Respondent) (*Withdrawn*)
- **0747-95-U:** United Food and Commercial Workers International Union (Applicant) v. Oshawa Group Limited (Respondent) (*Withdrawn*)
- 1712-95-U: United Steelworkers of America (Applicant) v. DEW Engineering and Development Limited (Respondent) (Withdrawn)
- 1755-95-U: Embaye Melekin (Applicant) v. The National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, Local 112 (Respondent) v. de Havilland Inc. (Intervener) (Dismissed)
- **2006-95-U:** Ontario Public Service Employees Union (Applicant) v. Wallaceburg & Sydenham District Association for Community Living (Respondent) (*Withdrawn*)
- 2176-95-U: Paul P.C. Lam (Applicant) v. Service Employees International Union (SEIU), Local 204 (Respondent) v. Toronto East General Hospital (Intervener) (Dismissed)
- **2217-95-U:** United Food and Commercial Workers International Union, Locals 175 and 633 (Applicant) v. Belfast Fruits Inc. (Respondent) (*Terminated*)
- 2368-95-U: The Ontario Public Service Employees Union (Applicant) v. Ministry of Health (Respondent) (Withdrawn)
- **2394-95-U:** Marcello Segreti (Applicant) v. Canadian Union of Public Employees, Local 63 (Respondent) v. The Canadian Union of Public Employees, Local 134, The Board of Education for the City of Toronto (Interveners) (*Dismissed*)
- 2518-95-U: Beverley A. Wright and Agnes Verhoeven (Warren) (Applicants) v. Ontario Public Service Employees Union, The Crown in Right of Ontario, St. Thomas Psychiatric Hospital (Respondents) (Dismissed)
- **2585-95-U:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. Collegiate Sports (Respondent) (*Withdrawn*)
- 3129-95-U: Local 2693, IWA-Canada (Applicant) v. Earnway Industries (Canada) Ltd. (Respondent) (Withdrawn)
- **3181-95-U:** Matteo Caruso (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local Union 514 (Respondent) v. Carriere Technical Industries (Intervener) (*Terminated*)
- **3184-95-U:** Ontario Public Service Employees Union (Applicant) v. Ministry of Solicitor General & Correctional Services (Respondent) (*Withdrawn*)
- **3380-95-U:** George Webb (Applicant) v. I.B.E.W. Local 1788 (Respondent) v. Ontario Hydro (Intervener) (Dismissed)
- **3419-95-U:** Canadian Union of Public Employees and its Local 2275 (Applicant) v. The Corporation of the County of Prince Edward (Respondent) (*Withdrawn*)
- **3449-95-U:** Stanko Landeka (Applicant) v. International Brotherhood of Painters & Allied Trades Local Union 1891 and Belmont Drywall & Acoustics (Respondents) (*Withdrawn*)

3481-95-U: IBEW Construction Council of Ontario (Applicant) v. 1078032 Ontario Inc. c.o.b. as Voltron Electrical Corp. (Respondent) (Withdrawn)

3499-95-U: The Religious Hospitallers of St. Joseph Health Centre of Cornwall (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

3500-95-U: Ontario Nurses' Association (Applicant) v. Community Nursing Home, Port Hope (Community Life Care Inc.) (Respondent) (*Terminated*)

3623-95-U: Rick Fagan (Applicant) v. United Steelworkers of America Local 9393 (Respondent) v. Kubota Metal Corporation Fahramet Division (Intervener) (*Withdrawn*)

3654-95-U: The Amalgamated Transit Union, Local 1585 (Applicant) v. The Hamilton Street Railway Company (Respondent) (*Withdrawn*)

3669-95-U: Garrick G. Robertson (Applicant) v. Teamsters Local 938 (Respondent) v. Clarke Transport, a Division of Newcap Inc. (Intervener) (*Dismissed*)

3676-95-U: Mahabub Hossain (Applicant) v. United Steelworkers of America Local 9304 (Respondent) (Withdrawn)

3728-95-U: Ontario Pipe Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Omico Mechanical Limited (Respondent) (Withdrawn)

3761-95-U: I.B.E.W. Construction Council of Ontario (Applicant) v. 797697 Ontario Limited c.o.b. as Lynes Electric (Respondent) (*Withdrawn*)

3781-95-U: Lynn Leveque (Applicant) v. K.I.N.W.U. (Respondent) (Dismissed)

3796-95-U: William J. Morreau (Applicant) v. Sarnia Transit (Respondent) (Dismissed)

3827-95-U: Nader Davani (Applicant) v. The City of Toronto (Respondent) (Dismissed)

3937-95-U: Vaughn Stephen (Applicant) v. Canadian Auto Workers - Local 222, National Union - CAW, General Motors of Canada (Respondents) (Dismissed)

3939-95-U: Darryl B. Norman (Applicant) v. Seimens Electric Ltd. (Respondent) (Dismissed)

3950-95-U: Jose Hilario (Applicant) v. United Food and Commercial Workers Local P529A (Respondent) (*Dismissed*)

3951-95-U: William Douglas Traquair (Applicant) v. Partek Insulations/, Local 456 C.A.W. (Respondents) (Dismissed)

3953-95-U: John J. Van Evera (Applicant) v. The Toronto Transit Commission (Respondent) (Dismissed)

3955-95-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. D. Millman Market Services Inc. (Respondent) (Withdrawn)

3981-95-U: Heather J. McDermott (Applicant) v. Ottawa Carleton Detention Centre (Respondent) (Dismissed)

3982-95-U: Shawn Rivers (Applicant) v. Western Canada Express Inc. (Respondent) (Dismissed)

APPLICATION FOR INTERIM ORDER

3731-95-M: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario Represented by Management Board of Cabinet (Respondent) v. Association of Management, Administrative And Professional Crown Employees Of Ontario (Amapceo) (Intervener) (Dismissed)

3755-95-M: Association of Management, Administrative and Professional Crown Employees of Ontario (Amapceo) (Applicant) v. Crown in Right of Ontario as represented by the Management Board of Cabinet (Respondent) (Withdrawn)

3944-95-M: David E. Smith et al. (Applicant) v. Ontario Public Service Employees Union (Respondent) v. The Crown in Right of Ontario as represented by Management Board of Cabinet (Intervener) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

3567-95-M: Salvation Army Addictions and Rehabilitation Centre, Industrial Centre c.o.b. as The Salvation Army Metro Toronto Recycling Centre (Applicant) v. Laundry and Linen Drivers and Industrial Workers, Local 847 (Respondent) (*Withdrawn*)

3779-95-M: Glove Reconditioners (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351 (Respondent) (*Granted*)

JURISDICTIONAL DISPUTES

2128-95-JD: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. State Group Limited, Sheet Metal Workers' International Association, Local 504 (Respondents) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1176-95-OH: Boyd Kinney, Thomas Morgan, Donald Leaman, Andrew Gomes, and CAW Local 222 (Applicant) v. Wally Kirk, and General Motors of Canada Limited (Respondents) (*Dismissed*)

3474-95-OH: Mr. John E. Beale (Applicant) v. Stelco Inc. (Respondent) (Terminated)

3522-95-OH: Robert Nobes (Applicant) v. John Karagiannis (Home Lighting) (Respondent) (Withdrawn)

3577-95-OH: Gary Wayne Mowat (Applicant) v. Acme Paper Products (Respondent) (Withdrawn)

3589-95-OH: Daniel J. Swatton (Applicant) v. Jebco Industries Inc. (Respondent) (Withdrawn)

3606-95-OH: Reginald Wonham (Applicant) v. The Paint Shoppe Services (Respondent) (Terminated)

3607-95-OH: Stokely McDonald (Applicant) v. Rudolph's Specialty Bakeries Ltd. (Respondent) (Withdrawn)

HOSPITAL LABOUR DISPUTES ARBITRATION ACT (Unfair Labour Practice)

3207-95-U: Steff-Kim Corporation Limited (Applicant) v. United Food and Commercial Workers Union, Local 175 (Respondent) (*Terminated*)

CONSTRUCTION INDUSTRY GRIEVANCES

4097-94-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of

America (Applicant) v. First Professional Management Inc., Stercon Investments Limited, Stephen-Mitchell Realty Limited, Glengreen Holdings Limited, 502627 Ontario Limited (Respondents) (Dismissed)

4280-94-G: Millwright District Council of Ontario on its own behalf and on behalf of its Local 1425 (Applicant) v. RLP Mechanical Ltd., RLP Machine & Steel Fabrication Inc. (Respondent) (*Terminated*)

0052-95-G: Sheet Metal Workers' International Association Local Union No. 30 (Applicant) v. Greenfield Sheet Metal Ltd. (Respondent) (*Granted*)

1011-95-G: Sheet Metal Workers' International Association, Local Union No. 285 (Applicant) v. E-M Air Systems Inc. (Respondent) (Endorsed Settlement)

1037-95-G: The International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. J. Magee Masonry Inc. (Respondent) (Withdrawn)

1065-95-G: The International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. EMC Contracting Company (Respondent) (Withdrawn)

1093-95-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Canrose Drywall Company Limited and 758755 Ontario Ltd. operating as Paragon Drywall Services and Concorde Drywall Company Ltd. (Respondents) (*Endorsed Settlement*)

1565-95-G: The International Brotherhood of Painters and Allied Trades, The Ontario Council of the International Brotherhood of Painters and Allied Trades and the International Brotherhood of Painters and Allied Trades, Local 1671 (Applicant) v. Knudsens Painters & Decorators Limited, 1065471 Ontario Limited c.o.b. as Kameo Enterprises (Respondents) (*Endorsed Settlement*)

1999-95-G; 2473-95-G: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. 630599 Ontario Limited c.o.b. as Domcan Acoustical Company (Respondent); United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Steflou Wall System & Acoustical Company (Respondent) (*Endorsed Settlement*)

2080-95-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. The State Group Limited (Respondent) (*Withdrawn*)

2146-95-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Triple A Electric Limited (Respondent) (*Granted*)

2307-95-G; 2308-95-G: Drywall Acoustics Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Suburban Drywall and Acoustics Inc. and SDA Interior Systems Inc. (Respondents) (Withdrawn)

2410-95-G: Ontario Council of the International Brotherhood of Painters and Allied Trades and the International Brotherhood of Painters and Allied Trades, Local 1671 (Applicant) v. Stonhard Ltd. (Respondent) v. The International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Interveners) (*Withdrawn*)

2569-95-G: United Brotherhood of Carpenters and Joiners of America, Local 1669 (Applicant) v. GC Rentals & Enterprise Ltd. and/or Carr Steel Investments Ltd. (Respondents) (*Withdrawn*)

3069-95-G: Sheet Metal Workers' International Association Local Union No. 285 (Applicant) v. Applewood Air Conditioning Ltd. (Respondent) (*Withdrawn*)

3318-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Porto Santo Bricklayers (Respondent) (*Granted*)

- **3341-95-G:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Bramalea Iron Works Ltd. (Respondent) (*Endorsed Settlement*)
- **3463-95-G:** United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council (Applicant) v. ASP Access Flooring (Respondent) (*Withdrawn*)
- **3464-95-G**; **3465-95-G**: United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council (Applicant) v. Ellis-Don Construction Ltd. (Respondent) (*Withdrawn*)
- **3477-95-G:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Cam Steel Limited (Respondent) (*Granted*)
- **3498-95-G:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Raymond Steel Ltd. (Respondent) (*Withdrawn*)
- **3504-95-G**; **3835-95-G**: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Industrial Commercial Insulation and Contracting (Sault) Ltd. (Respondent) (Endorsed Settlement)
- **3532-95-G:** Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. 1013530 Ontario Ltd. (Respondent) (*Withdrawn*)
- **3537-95-G:** Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Speedy Masonry Co. Ltd. (Respondent) (*Withdrawn*)
- **3595-95-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Zentil Plumbing & Heating Contracting Ltd. (Respondent) (*Dismissed*)
- **3640-95-G:** Teamsters Local Union No. 230 Affiliated with the International Brotherhood of Teamsters (Applicant) v. Roadbuilders Haulage Limited (Respondent) (*Withdrawn*)
- 3655-95-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rae Brothers Ltd. (Respondent) (Withdrawn)
- **3702-95-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Solmar Homes Inc., Tesmar Developments Inc., Benfal Developments Inc. (Respondents) (*Granted*)
- **3711-95-G:** Labourers' International Union of North America, Local 607 (Applicant) v. MNT Builders Limited and Leemac Group Inc. (Respondents) (*Withdrawn*)
- **3716-95-G:** Sheet Metal Workers' International Association, Local 269 (Applicant) v. Amherst Roofing & Sheet Metal Ltd. (Respondent) (*Withdrawn*)
- **3720-95-G:** International Union of Elevator Constructors, Local 50 (Applicant) v. CEE Elevator Service Ltd. (Respondent) (*Endorsed Settlement*)
- 3722-95-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. D. & F. Insulation Ltd. (Respondent) (Endorsed Settlement)
- **3736-95-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Two Way Forming Inc. (Respondent) (*Endorsed Settlement*)
- **3740-95-G:** Labourers' International Union of North America, Local 183 (Applicant) v. T. F. Forming Incorporated (Respondent) (*Granted*)

3741-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Rino Forming Ltd. (Respondent) (*Endorsed Settlement*)

3742-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Rino Structural Concrete Ltd. (Respondent) (*Endorsed Settlement*)

3745-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Polvian Construction Limited (Respondent) (*Endorsed Settlement*)

3747-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Truestar Forming Ltd. (Respondent) (*Endorsed Settlement*)

3749-95-G: Labourers' International Union Of North America, Local 183 (Applicant) v. Ferma Construction Company Inc. (Respondent) (*Endorsed Settlement*)

3773-95-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lisgar Construction Company (Respondent) (*Withdrawn*)

3777-95-G: International Brotherhood of Painters and Allied Trades District Council 46 (Applicant) v. Lesniewski Painting Ltd. (Respondent) (*Endorsed Settlement*)

3789-95-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. P & E Drywall Ltd. (Respondent) (Withdrawn)

3809-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. York Concrete Forming (Respondent) (*Endorsed Settlement*)

3820-95-G: International Brotherhood of Painters and Allied Trades, Local Union 1819 (Applicant) v. Industrial Glass & Aluminum (Respondent) (*Endorsed Settlement*)

3823-95-G: The International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades Local 1494 (Applicant) v. Guardian Glass Ltd. (Respondent) (*Endorsed Settlement*)

3824-95-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Trio Mechanical Contractors Limited (Respondent) (*Withdrawn*)

3838-95-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dixon Construction Ltd. (Respondent) (Withdrawn)

3839-95-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Jackson Lewis Company Inc. (Respondent) (Withdrawn)

3840-95-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sarra General Contractors Ltd. (Respondent) (*Endorsed Settlement*)

3847-95-G: International Union of Bricklayers and Allied Craftsmen, Local 28 Ontario (Applicant) v. B.N. Tile (Respondent) (*Withdrawn*)

3897-95-G: International Brotherhood of Painter and Allied Trades, Local Union 1819 (Applicant) v. McNamara Glass Ltd. (Respondent) (*Endorsed Settlement*)

3919-95-G: United Brotherhood of Carpenters and Joiners of America, Local 446 (Applicant) v. Leo Alarie & Sons Limited (Respondent) (*Endorsed Settlement*)

3941-95-G: Construction Workers Local 53, CLAC (Applicant) v. Mario Electric Limited (Respondent) (Endorsed Settlement)

3954-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Skyline Carpentry Ltd. (Respondent) (*Endorsed Settlement*)

3963-95-G: Labourers' International Union of North America, Local 625 (Applicant) v. Teperman and Sons Inc. (Respondent) (*Endorsed Settlement*)

3965-95-G: Labourers' International Union of North America Local 183 (Applicant) v. Con Via Construction Inc./Rulman Masonry Inc. (Respondent) (*Endorsed Settlement*)

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

2629-95-M: The Crown in Right of Ontario Represented by Management Board of Cabinet (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Endorsed Settlement*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0868-95-R: Canadian Hotel and Service Worker Union (Applicant) v. Romzap Ltd. c.o.b. as Sheraton Fallsview Hotel & Conference Centre (Respondent) (*Dismissed*)

1458-95-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. EPQ Construction Company Limited (Respondent) (*Granted*)

1984-95-R: Power Workers' Union, CUPE Local 1000 (Applicant) v. The Public Utilities Commission of the City of Sault Ste. Marie (Respondent) (Dismissed)



CASE LISTINGS MARCH 1996

	PAGE
1.	Complaints of Unfair Labour Practice
2.	Complaints under the Occupational Health and Safety Act
3.	Crown Employees Collective Bargaining Act



APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 1996

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3638-95-U: Michelle Mahovlich (Applicant) v. C.U.P.E. Local 1144 and St. Joseph's Health Centre (Respondents) (*Dismissed*)

3949-95-U: Mika Vitas (Applicant) v. Canadian Security Union (Respondent) (Withdrawn)

4067-95-U: The Crown in right Ontario, as represented by the Management Board of Cabinet (Applicant) v. Ontario Public Service Employees Union, Mitch Bevan, Jerry Foreman, Michael Moccia and Wayne Thurston and those persons named in appendix 'B' (Respondent) (*Dismissed*)

4174-95-U: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario Represented By Management Board Of Cabinet Ministry of the Attorney General - Office Adm. Unit (Respondent) (*Endorsed Settlement*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

4187-95-OH: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario (Kenora Jail) (Respondent) (*Endorsed Settlement*)

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

4184-95-U: The Crown in Right of Ontario as represented by the Ministry of Health (Applicant) v. The Ontario Public Service Employees Union and Dr. Ann Dyer and Joan Gates (Respondent) (Endorsed Settlement)

Ontario Labour Relations Board, 400 University Avenue, Toronto, Ontario M7A 1V4







